

11-27-2013

Johnson v. State Clerk's Record v. 2 Dckt. 41414

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#41414

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

Robert Johnson

Petitioner and

Appellant

VS.

State of Idaho

Respondent and

Appealed from the District Court of the 5th
Judicial District for the State of Idaho, in and

for Gooding County

Hon. JOHN BUTLER District Judge

Sara Thomas, SAPD

Attorney for Appellant

Lawrence Warden, AB

Attorney for Respondent

Filed this _____ day of _____, 19____

Clerk

By _____ Deputy

CAXTON PRINTERS, CALDWELL, IDAHO 152454

Vol 2

41414

* * * * *

VOL 2

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Date: 2/1/2013

Fifth Judicial District Court - Gooding County

User: CYNTHIA

Time: 09:34 AM

ROA Report

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Case: CV-2013-0000084 Current Judge: John Butler

Robert Terry Johnson, et al., Plaintiff vs State Of Idaho, Defendant

Robert Terry Johnson, State Of Idaho, Plaintiff vs State Of Idaho, Defendant

Date	Code	User	Judge
2/14/2013	NCPC	CYNTHIA	New Case Filed - 2nd Successive Petition for Conviction Relief
	APER	CYNTHIA	Subject: State Of Idaho Appearance Luverne E. Shull
		CYNTHIA	Filing: H10 - Post-conviction act proceedings Paid by: Johnson, Robert Terry (subject) Receipt number: 0000471 Dated: 2/14/2013 Amount: \$.00 (Cash) For: Johnson, Robert Terry (subject)
	PETN	CYNTHIA	Petition and Affidavit for 2nd Successive Post Conviction Relief
	MISC	CYNTHIA	Supplement to 2nd Successive PCR - List of Exhibits in Support of Petition
	MOTN	CYNTHIA	Motion and Affidavit in Support of Appt of Counsel
3/7/2013	MOTN	CYNTHIA	Ex Parte Motion to Extend Time
3/12/2013	NOTC	CYNTHIA	Court's Notice of Intent to Dismiss
	MOTN	CYNTHIA	Amended Ex-Parte Motion to Extend time for Response
3/13/2013	ORDR	CYNTHIA	Order Granting Ex Parte Motion to Extend time
	MISC	CYNTHIA	Objection to Ex-Parte Motion to Extend Time
3/26/2013	ORDR	CYNTHIA	Order Granting Extension of Time to Respond
3/29/2013	MISC	CYNTHIA	Petitioner's Response to Notice of Intent to Dismiss
4/17/2013	MOTN	CYNTHIA	Ex Parte Motion for Order Clarifying Dates for State's Response
4/18/2013	ORDR	CYNTHIA	Order Clarifying Time for Response
4/22/2013	ORDR	CYNTHIA	Order re: Appointment of Counsel
	ORPD	CYNTHIA	Subject: Johnson, Robert Terry Order Appointing Public Defender Court appointed Steven R McRae
6/6/2013	MOTN	CYNTHIA	Motion for Extension of Time to Answer
	AFFD	CYNTHIA	Affidavit of Steven McRae
	ORDR	CYNTHIA	Order Granting Motion for Extension of Time to Answer
7/3/2013	REPL	CYNTHIA	Petitioners Reply to Notice of Intent to Dismiss (includes Affidavit of Erik Lehtinen)
	AFFD	CYNTHIA	Affidavit of Robert Jones
	AFFD	CYNTHIA	Partial Supp Affidavit of Robert Johnson
7/5/2013	SUPP	CYNTHIA	Supplemental Response by the Petitioner
7/31/2013	MEMO	CYNTHIA	Memorandum Decision re Notice of Intent to Dismiss
	JDMT	CYNTHIA	Judgment of Dismissal

Date: 7/31/2013

Fifth Judicial District Court - Gooding County

User: CYNTHIA

Time: 09:34 AM

ROA Report

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Case: CV-2013-0000084 Current Judge: John Butler

Robert Terry Johnson, etal., Plaintiff vs State Of Idaho, Defendant

Robert Terry Johnson, State Of Idaho, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
7/31/2013	STAT	CYNTHIA	STATUS CHANGED: Closed	John Butler
	CDIS	CYNTHIA	Civil Disposition entered for: Johnson, Robert Terry, Subject; State Of Idaho, Subject. Filing date: 7/31/2013	John Butler
8/1/2013	PETN	CYNTHIA	Petition to Declare Petitioner a Vexatious Litigant	John Butler
8/8/2013	MISC	CYNTHIA	Objection to Petition to Declare Petitioner a Vexatious Litigant	John Butler
8/14/2013	MOTN	CYNTHIA	Motion to Reconsider/Request Opportunity to Respond	John Butler
8/20/2013	MOTN	CYNTHIA	Motion for Appointment of Counsel	John Butler
	AFFD	CYNTHIA	Affidavit in Support of Motion	John Butler
	MOTN	CYNTHIA	Motion to Extend Time to Respond	John Butler
8/26/2013	MISC	CYNTHIA	Objection to the Petitioners Motion for Appointment of Counsel	John Butler
8/27/2013	ORDR	CYNTHIA	Order Denying Motion for Reconsideration	John Butler
9/9/2013	APSC	CYNTHIA	Appealed To The Supreme Court	John Butler
	STAT	CYNTHIA	STATUS CHANGED: Inactive	John Butler
	MOTN	CYNTHIA	Motion for Appointment of SAPD	John Butler
9/10/2013	ORDR	CYNTHIA	Order Apopinting SAPD on Appeal	John Butler

ORIGINAL

DISTRICT COURT
GOODING CO. IDAHO
FILED

LUVERNE E. SHULL, Prosecuting Attorney ISBN 5477
Cindy L. Campbell, Chief Deputy, ISBN 3677
Jeremy C. Vaughn, Deputy ISBN 7266
P. O. Box 86/624 Main Street Gooding, Idaho 83330
Telephone (208) 934-4493 Facsimile (208) 934-4494
goodingprosecutor@gmail.com

2013 APR 25 PM 2: 08

GOODING COUNTY CLERK
JULIE GOLD

BY: _____
DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

ROBERT JOHNSON,	)	CASE NO. CV-2013-84
)	
Petitioner,)	
)	
vs.	)	ANSWER
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

COMES NOW, the State of Idaho, by and through Luverne E. Shull, Gooding County Prosecuting Attorney, and does hereby answer Robert Johnson's Second Successive Petition for Post-Conviction Relief in the above-entitled action as follows:

I.

GENERAL RESPONSES TO ROBERT JOHNSON'S POST-CONVICTION ALLEGATIONS

All allegations made by Robert Johnson are denied by the state unless specifically admitted herein.

II.

SPECIFIC ANSWERS TO ROBERT JOHNSON'S POST-CONVICTION ALLEGATIONS

1. The State admits that the Petitioner is in custody at the Idaho Correctional Center.
2. The State admits that the name and location of the court which imposed the Petitioner's judgement/sentence is the Fifth District Court, Gooding, Idaho.
3. a. The State admits the case number for which sentence was imposed is 4367.

- b. The State admits that the Offenses the Petitioner was convicted of were two counts of first degree murder.
4. a. The State admits that the date the Petitioner's sentence was imposed was October 21st, 1994.
- b. The State admits the terms of the Petitioner's sentence were two terms of fixed life.
5. The State admits that a finding of guilty was made after pleas to both counts of first degree murder.
6. The State admits that the Petitioner did not appeal from the judgement of conviction or the imposition of sentence. The State also acknowledges that by the terms of the Rule 11 Plea Agreement and Acceptance the Petitioner waived his right to appeal the judgement and sentence.
- Petitioner alleges:

"#1. Prosecution withheld evidence, a taped confession of Thomas Petersen, that would have proved that I did not willfully commit any crime and was actually a victim."

7. Petitioner alleges that the prosecution withheld evidence, a taped confession of Thomas Petersen, that would have proved that the Petitioner has not committed a crime and was actually a victim. The State denies the allegation. The confessions of the Petitioner and his co-defendant, Thomas Robert Petersen were extensively examined in open court at the preliminary hearing held October 22, 1993. Transcript p.20 and following. The taping of the interviews containing Thomas Petersen's confessions was disclosed and discussed in the Petitioner's presence at the preliminary hearing held October 22, 1993. Transcript pp. 89-92.

Discovery responses reveal that complete transcripts of the interviews of both defendants were provided to both defendants' attorneys November 17, 1993, well before the Rule 11 Plea Agreement June 24, 1994. See the Acknowledgment of Discovery, dated November 17, 1993,

by Craig D. Hobdey, and State's Response to Discovery, dated November 17, 1993, signed by Philip A. Brown.

Petitioner's claim that Thomas Robert Petersen harmed him the night of the murders, the Petitioner's claims that he feared people his co-defendant Thomas Robert Petersen might influence against him, and Petitioner's wish for witness protection were all out in the open at the preliminary hearing held October 22, 1993. Transcript p. 42, 70-71.

Mr. Robert Terry Johnson's Defense Counsel's Sentencing Memorandum dated September 20, 1994, provides:

Mr. Johnson has contended all along that he voluntarily accompanied Mr. Peterson into the house, helped tie up Rick Mangum, and had anal intercourse with Connie Allen. Furthermore, Mr. Johnson has admitted from the outset that he did nothing to stop Mr. Peterson. It was Mr. Johnson who eventually told the police what had happened, even though Peterson threatened him, in the presence of others, with death if he "snitched".

Robert Terry Johnson's Defense Counsel's Sentencing Memorandum, September 20, 1994, page 4.

Petitioner alleges:

"#2. New Evidence in the form of a signed and notarized affidavit of Thomas Petersen stating unknown facts that would have supported my original criminal defense and stopped me from entering into a plea agreement to save my life from the Death Penalty."

8. Petitioner alleges there is new evidence in the form of a confession by Thomas Petersen stating facts that were unknown to the Petitioner that would have stopped Petitioner from a plea agreement and proved the Petitioner's innocence. The Petitioner is one of two living people that were present when the murders occurred and cannot now be surprised and disadvantaged by any alleged conspiracy against him. These issues would have been present at the time of the crimes and/or prior to his plea negotiations and pleas of guilty. Therefore, these issues are all untimely. Now, Petitioner contends that he only engaged in criminal behavior because he had to or his co-defendant would have murdered him. Any necessity defense should have been intimately known

to Petitioner and trial counsel from the very beginning because only Petitioner and his co-defendant were aware of what really happened. Any such issue was timely then, and even for the sake of argument assuming Petitioner has lately come into additional evidence confirming facts Petitioner was aware of then, and the State does not concede that point, this Petition is untimely. *See also* the response to paragraph 7. *supra*. Further, Petitioner waived any necessity defense when he entered his guilty plea, and waived his right to appeal. Except for the above response the State does not have sufficient information to form a belief as to the truth of this allegation, and therefore denies the allegation, reserving the right to amend this answer upon further investigation.

Petitioner alleges:

“#3. Ineffective assistance of Counsel by S. Swensen, who also withheld information about the withheld taped confession of Thomas Petersen and the coverup that ensued.”

Petitioner also alleges:

“S. Swensen knew of the taped confession of Thomas Petersen and knew that the Prosecutor was withholding the tape and the information on it. Swensen knew that Peterson threaten to kill me if I did not do what he (petersen) said. Swensen did not inform me or the Court of his knowledge of the tape recording, and the information on it, adding to the conspiracy to hide evidence.”

9. Petitioner alleges ineffective assistance of counsel, by Severt Swenson, in original Post Conviction, Gooding County Case No. CV 1995-803, (previously designated SP-95-00196) for withholding information/evidence and conflict of interest. Petitioner's first petition for post conviction relief largely dealt with allegedly unkept promises and attempted to throw out Petitioner's confession as coerced by the Prosecution's underhandedness.

Any conflict issue between Mr. Swenson and Petitioner should have been readily apparent to Petitioner at the time of his first Petition for Post Conviction Relief and the time to deal with any such conflict was during the course of that proceeding. The Register of Actions reveals that the dismissal of the first Petition for Post Conviction Relief was not appealed. The State denies that petitioner received ineffective assistance of post-conviction counsel in any way at any stage of the proceedings in Gooding County Case No. SP-95-00196, Petitioner's first Post Conviction Relief case. Further, the State answers that petitioner's allegation is not a cognizable claim. Idaho Code § 19-4904 provides no absolute right to counsel during post-conviction. Except for the above response, the State does not have sufficient information to form a belief as to the truth of this allegation, and therefore denies the allegation, reserving the right to amend this answer upon further investigation. Even if every allegation of Petitioner against counsel were true, Petitioner cannot show he was prejudiced under the second prong of Strickland v. Washington, 466 U.S. 688 (1984).

Petitioner alleges:

"#4. Ineffective assistance of Counsel by David Heida for not filing an amended Successive Post Conviction as he stated that he was going to.

#5. Inffective assistance of Counsel by David Heida for not presenting information/evidence pertaining to the arguments of the State on timeliness of the filing of the Successive Post Conviction Petition, once they were brought to his attention.

#6. Ineffective assistance of Counsel by David Heida for not conducting Discovery that he claimed he would do.

#7. Ineffective assistance of Counsel by David Heida for delaying Discovery and obtaining affidavits too late to file before a known court date.

#8. District Court error in not having a hearing on filed motions by the Petitioner that were at the heart of the issues before the Court pertaining to the Summary Dismissal that the Court was deciding on. Petitioner was trying to correct errors by his counsel before the Court made a ruling.”

Petitioner also alleges:

“David Heida deceived me into believing he was going to file an amended Successive Post Conviction, that I asked him to do, to fix fundamental errors from my filed Petition, especially dealing with the length of time it took me to file, which is the heart of the reasoning for the Summary Dismissal. He claimed, in writing, to be actively conducting a Discovery (obtaining Medical Records, affidavits, and depositions) which he failed to do. I told him about why it took me so long to file and the people that could write affidavits on my efforts to figure out what to file and how to file in Court about the new evidence suddenly presented to me by Thomas Petersen. Mr. Heida also failed to present facts that I pointed out to him, in writing and in phone conversations, that pointed to the facts about the missing tape (that a law enforcement officer testified that the tape was missing, that the other tapes were already transcribed and in his possession, and that he himself had possession of it at one time). Mr. Heida failed to inform the Court of any facts the record showed that I told him about.”

The State denies that petitioner received ineffective assistance of post-conviction counsel in any way at any stage of the proceedings in Gooding County Case No. CV 2009-399. Mr. Heide requested the opportunity to conduct discovery. (ROA 9/14/2009). The State objected to Mr. Heide’s request to conduct discovery and filed a memorandum in opposition to the motion to conduct discovery. (ROA 9/25/2009). Further, the State answers that petitioner’s allegations are

not cognizable claims. Idaho Code § 19-4904 provides no absolute right to counsel during post-conviction. Except for the above response, the State does not have sufficient information to form a belief as to the truth of these allegations, and therefore denies the allegations, reserving the right to amend this answer upon further investigation. Even if every allegation of Petitioner against counsel were true, Petitioner cannot show he was prejudiced under the second prong of Strickland v. Washington, 466 U.S. 688 (1984).

Petitioner alleges:

“#9. Ineffective assistance of Counsel by Erik Lehtinen for not raising issues on appeal about my filed motions before the District Court that were vacated for some unknown reason, which has information on material facts of my Petition.

#10. Ineffective assistance of Counsel of Erik Lehtinen for not presenting issues/facts/caselaw properly in front of the Court.”

Petitioner also alleges:

“Erik Lehtinen failed to bring up that I tried by filing motions in District Court, to correct errors of my appointed attorney, that would have assisted my petition, and could have saved the Courts much time and effort. Mr. Lehtinen also admitted to me on the phone that a Idaho Supreme Court Justice told him that he failed to present the issues on timeliness properly before the Court and even called him a liar.”

Answering the allegations against Mr. Lehtinen, the state admits that the Petitioner was provided counsel but denies the conclusory allegations, and as to the assertions of ineffective assistance of counsel, the state denies the allegations. Even if every allegation of Petitioner against counsel were true, Petitioner cannot show he was prejudiced under the second prong of Strickland v. Washington, 466 U.S. 688 (1984).

In response to Petitioner's allegations in his "Response to Notice of Intent to Dismiss," filed March 29, 2013, that "[t]his Court is also using this Notice of Intent to Dismiss as a cover-up of the Gooding County Prosecutor's lies in his Ex-Parte Motion to Extend Time to Respond. . . ." (at page 6).

The State denies the Petitioner's conclusory allegations. The March 12, 2013 "Amended Ex-Parte Motion to Extend Time For Response" corrected the March 6, 2013 "Ex-Parte Motion to Extend Time For Response."

FIRST AFFIRMATIVE DEFENSE

Robert Terry Johnson's petition fails to state any grounds upon which relief can be granted. Idaho Code § 19-4901(a); I.R.C.P. 12(b)(6).

SECOND AFFIRMATIVE DEFENSE

To the extent Robert Terry Johnson's claims should have been raised on direct appeal, the claims are procedurally defaulted. Idaho Code § 19-4901(b). Further, the claims were waived by agreement.

THIRD AFFIRMATIVE DEFENSE

Robert Terry Johnson has failed to file his petition within the one year statute of limitation and the claims are now time-barred. Idaho Code § 19-4902(a).

FOURTH AFFIRMATIVE DEFENSE

Robert Terry Johnson's Petition for Post-Conviction Relief contains bare and conclusory allegations unsubstantiated by affidavits, records, or other admissible evidence, and therefore fails to raise a genuine issue of material fact. Idaho Code §§ 19-4902(a), 19-4903, and 19-4906.

FIFTH AFFIRMATIVE DEFENSE

Waiver, and/or issue preclusion, and/or collateral estoppel, and/or res judicata, and/or law of the case and /or laches apply and Petitioner is therefore estopped from alleging now that his confession prejudiced him.

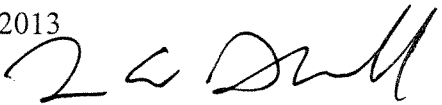
SIXTH AFFIRMATIVE DEFENSE

Petitioner has filed a prior petition for post-conviction relief in state court. The State specifically raises a successive petition/res judicata/law of the case/procedural default bar. Idaho Code § 19-4908.

WHEREFORE, Respondent prays for relief as follows:

- a) That Robert Johnson's claims for post-conviction relief be denied;
- b) That Robert Johnson's claims for post-conviction relief be dismissed;
- c) for such other and further relief as the court deems necessary in the case.

DATED this 25 day of April, 2013



Luverne E. Shull
Gooding County Prosecuting Attorney

VERIFICATION

The Respondent, by and through Luverne E. Shull, being first duly sworn under oath, deposes and says:

- 1) I am the attorney for the Respondent in the above-entitled matter.
- 2) That the facts contained in the foregoing Answer to Petitioner's Petition for Post-Conviction Relief are true and correct to the best of my information and belief.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25th day of April, 2013, I caused a true and correct copy of the foregoing ANSWER to be placed in the United States mail, postage prepaid, addressed to:

Robert Johnson #27073
ICC/H210B
P.O. Box 70010
Boise, ID 83707

X U.S. Mail
 Hand Delivered
 Overnight Mail

Steven McRae

X U.S. Mail

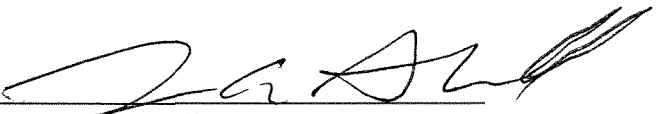
Attorney at law

 Hand Delivered

121 3rd Avenue East
Jerome, Idaho 83338

 Overnight Mail

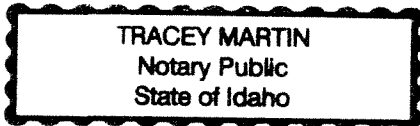




Luverne E. Shull

STATE OF IDAHO)
) ss:
County of Gooding)

I hereby certify that on this 25 day of April, I personally appeared before me. Luverne E. Shull, who, being first duly sworn, declared that he is representing the Respondent in this action, and that the statements contained in the foregoing document are believed to be true to the best of my information and belief.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year first above written.




Notary Public for Idaho
Residing at: CAMAS CO., Idaho
My Commission Expires: 9/7/16

Steven R. McRae [ISB No. 7984]
 McRAE LAW OFFICE, PLLC
 P.O. Box 1233
 Twin Falls, ID 83303-1233
 Telephone No. (208) 944-0755
 Facsimile No. (208) 736-0041
 e-mail: SMcRae@MagicValleyLegal.com

Attorney for Petitioner

DISTRICT COURT
 GOODING CO. IDAHO
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2013 JUL -3 PM 2:50

GOODING COUNTY CLERK

BY:  DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF
 IDAHO, IN AND FOR THE COUNTY OF GOODING

ROBERT JOHNSON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-2013-84

**PETITIONER'S REPLY TO NOTICE
 OF INTENT TO DISMISS**

COMES NOW, Petitioner, Robert Johnson, by and through his attorney of record, Steven R. McRae of McRae Law Office, PLLC, and files this Reply to the Court's *Notice of Intent to Dismiss* (the "Notice of Intent") (the "Reply"). In the Notice of Intent, the Court sets forth reasoning to dismiss Petitioner's *Petition and Affidavit for 2nd Successive Post-Conviction Relief* (the "Petition"). This Reply is supported by the *Affidavit of Robert Richard Jones*, the *Affidavit of Robert Johnson*, and the *Affidavit of Erik Lehtinen*.

Herein, Petitioner sets forth why his claims must be allowed to proceed. Petitioner asserts herein that he has set forth enough evidence in his Petition so as to survive dismissal pursuant to Idaho Code § 19-4906(b), and Petitioner seeks this Court to direct that the

proceedings should continue pursuant to Idaho Code § 19-4906(b). Petitioner further asks that the appointment of Steven R. McRae be expanded to allow Mr. McRae the ability to propose an amended petition under the guidance provided herein pursuant to Idaho Code § 19-4906(b), with at least four (4) weeks to prepare the same. **Petitioner seeks oral argument on this matter.**

STATEMENT OF FACTS AND PROCEDURE

On June 24, 1994, Petitioner entered pleas of guilty to two counts of felony murder pursuant to plea negotiations whereby the State would not seek the death penalty. On September 21, 1994, Petitioner was sentenced to fixed life with no possibility of parole. Pursuant to his plea agreement, Petitioner did not appeal his sentence.

On November 30, 1995, Petitioner filed a petition for post-conviction relief (the "1995 Post-Conviction Petition"). In filing the 1995 Post-Conviction Petition, Petitioner had not individually prepared the documents for the case. *Partial Supplemental Affidavit of Robert Johnson ("Johnson Affidavit")*, at 2. Petitioner utilized the services of an Inmate Law Clerk that was provided to him at the Idaho Maximum Security Institution ("IMSI"), where Petitioner was incarcerated at the time. *Id.*

Inmate Law Clerks, such as Robert Richard Jones, were utilized in IMSI to assist inmates, *interalia*, with their post-conviction matters. *Affidavit of Robert Richard Jones ("Jones Affidavit")* at 2. The Inmate Law Clerks would meet with inmates that had legal inquiries, including on topics of post-conviction. *Id.* After the meeting with an inmate, the Inmate Law Clerk would either provide advice to the inmate, or the Inmate Law Clerk would draft the required legal documents for the inmate. *Id.* If the Inmate Law Clerk determined that he/she would draft the required legal documents for the inmate, it was often normal practice that the

Inmate Law Clerk prepared the legal documents with very little involvement from the inmate. *Id.*

In preparing the 1995 Post-Conviction Petition, Petitioner met with the Inmate Law Clerk and explained his underlying criminal case. *Johnson Affidavit*, at 2. At that time, the Inmate Law Clerk explained to Petitioner that the Inmate Law Clerk could help Petitioner. *Id.* The Inmate Law Clerk took from Petitioner the documents that Petitioner had in regards to his underlying criminal case. *Id.* The Inmate Law Clerk prepared all of the documents for Petitioner's 1995 Post-Conviction Petition. *Id.* Petitioner did not prepare the documents for his 1995 Post-Conviction Petition whatsoever, as he relied on the expertise of the Inmate Law Clerk. *Id.* The Inmate Law Clerk also assisted Petitioner in filing the 1995 Post-Conviction Documents with the Court in Gooding County.

Petitioner's 1995 Post-Conviction Petition was summarily dismissed on June 13, 1996. Petitioner appealed the summary of dismissal of his petition. The Idaho Court of Appeals, in an unpublished opinion, affirmed the dismissal of the petition for post-conviction relief. *Johnson v. State*, 1997 Unpublished Opinion No. 617 (July 10, 1997). The remittitur was filed with the District Court on August 11, 1997.

Sometime in 2009, Thomas Peterson, the alleged co-defendant in Petitioner's underlying criminal case, handed Petitioner a notarized confession. *Id.* Such confession stated, in summary, that: (a) Petitioner was very drunk to the point of barely walking, and Mr. Peterson took charge and threatened everyone, including Petitioner; (b) Mr. Peterson completed the tying and cutting himself and threatened death to Petitioner if he did not help; (c) Mr. Peterson gave the information to the prosecutors and his defense attorneys during and after the investigation; and

(d) Mr. Peterson's defense attorneys told Mr. Peterson to place blame on Petitioner so as to avoid the death penalty. *Id.* at 2, and *Exhibit A*.

At that time, Mr. Peterson also informed Petitioner that Mr. Peterson had confessed to the crimes that Petitioner was charged with and confessed that Petitioner was a victim on the night in question – which confession was on an audio tape – before Mr. Peterson and Petitioner were charged with the crime of murder as co-defendants. *Id.* at 2. Mr. Peterson further stated that he had confessed to his lawyers, including Severt Swenson. *Id.* Mr. Peterson also told Petitioner that Mr. Phillip Brown, the Gooding County Prosecutor at the time of Petitioner's underlying criminal case, knew that Petitioner was a victim the night that Mr. Peterson committed the murders and that Mr. Peterson had made an agreement with Mr. Swenson and Mr. Brown to point the finger at Petitioner to save Mr. Peterson from facing the death penalty. *Id.* at 3. Petitioner was unaware of the information, including the existence of a confession on an audio tape, until Mr. Peterson gave Petitioner the notarized confession and stated the information. *Id.*

As soon as Petitioner could, he made an effort to contact the paralegal at the Idaho Correctional Center ("ICC"), where he was incarcerated at the time, and Petitioner inquired how to proceed with the new information. *Id.* At that time, Petitioner was aware that ICC no longer employed Inmate Law Clerks. *Id.*

While Petitioner waited for the paralegal to allow his inquiry, Petitioner contacted his aunt, Karen Devine, as soon as he could. *Id.* Petitioner asked his aunt to help find him an attorney that could help Petitioner determine how to proceed with the new information from Mr. Peterson. *Id.* Petitioner's aunt provided Petitioner with addresses of attorneys for Petitioner to contact. *Id.* As soon as Petitioner was able, he wrote letters to all of the attorneys whose addresses Petitioner's aunt provided. *Id.*

After Petitioner was able to meet with the paralegal at ICC, the paralegal informed Petitioner that he was not an attorney and could not give Petitioner advice on what to do or how to proceed. *Id.*

Only one attorney replied to Petitioner's letter, Dennis Benjamin. *Id.* Petitioner spoke with Mr. Benjamin on the telephone as soon as he was able and allowed to do the same. *Id.* Mr. Benjamin told Petitioner that the proper way to use the new information was to file another post-conviction petition. *Id.* Until his conversation with Mr. Benjamin, which was in May of 2009, Petitioner was unaware that the proper procedure to use the information was to file another post-conviction petition. *Id.* at 4. Also, Petitioner was unaware that he had the legal ability to file a subsequent post-conviction petition after filing his 1995 Post-Conviction Petition. *Id.*

At his next available time, Petitioner again visited the paralegal of ICC and requested a packet of documents for post-conviction petitioners. *Id.* Petitioner completed the work on the post-conviction papers, which took considerable time, despite Petitioner's best efforts to complete the packet. *Id.* It took weeks for Petitioner to request the packet, receive the packet, fill out the information needed in the packet, request an appointment to make copies of the packet, request an appointment in ICC for notary services and to mail out the completed packet. *Id.*

On July 29, 2009, Petitioner filed his Successive Petition for Post-Conviction Relief (the "2009 Post-Conviction Petition"), in which Petitioner alleged, in part, that the State had withheld exculpatory evidence in the form of statements of Mr. Peterson that exonerated Petitioner from involvement in the murders.

The State filed a Motion for Summary Dismissal based upon the merits and on the basis that the petition was untimely. Petitioner informed his attorney on the 2009 Post-Conviction

Petition, David Heida, of the facts as contained above in in regards to the process of filing both his 1995 Post-Conviction Petition and the 2009 Post-Conviction Petition. *Id.* Mr. Heida did not use the information in representing Petitioner in the 2009 Post-Conviction Petition in combatting the argument that the 2009 Post-Conviction Petition should be dismissed as untimely. *Id.* The 2009 Post-Conviction Petition was dismissed by the District Court on the merits and also on the basis that the 2009 Post-Conviction Petition was untimely.

Petitioner's case was transferred to the Idaho State Appellate Public Defender's Office ("SAPD"), where Erik Lehtinen represented Petitioner. *Affidavit of Erik R. Lehtinen* ("*Lehtinen Affidavit*"), at 1. Mr. Lehtinen noted in his representation that Petitioner's counsel, David Heida and Isaac Keppler, never made a record of why it took Petitioner approximately four months to file the 2009 Post-Conviction Petition. *Id.* at 3. However, Mr. Lehtinen did not perceive the timeliness challenge as credible, and therefore only cursorily addressed it in his briefing. *Id.* at 3-4. The briefing from the State at the appellate level was primarily directed at the issue of timeliness. *Id.* at 4. The State primarily argued that Petitioner had failed to make a factual showing of the unique facts of the case and why Petitioner had filed his petition within a "reasonable time". *Id.* at 4-5.

Mr. Lehtinen regretted that he did not have a record of the specific reasons why it took Petitioner approximately four months to file his successive petition and made the alternate arguments that 1) four (4) months simply was a "reasonable time" for an indigent, incarcerated *pro se* petitioner to file a successive petition and 2) a "reasonable time" standard in non-capital cases should be defined in terms of usual statute of limitation in non-capital post-conviction cases (of one year). *Id.* at 6. The Court of Appeals affirmed the dismissal of the 2009 Post-Conviction Petition solely on the basis that it was untimely filed and did not address the merits of

Petitioner's 2009 Post-Conviction Petition. *Johnson v. State*, 2011 Unpublished Opinion No. 574 (August 8, 2011). Mr. Lehtinen believes that the Court of Appeals may have reached a different conclusion had Petitioner had a better record detailing the specific reasons why the 2009 Post-Conviction Petition was not filed until approximately four months after his discovery of the *Brady* evidence / violation. *Id.* at 8.

Mr. Lehtinen filed a timely petition for review with the Idaho Supreme Court, in which he argued that review should be granted in order for the Supreme Court to resolve the question left unanswered by *Pizzuto* – whether the “reasonable time” standard in non-capital cases should be defined in terms of usual statute of limitations in non-capital post-conviction cases, i.e., one year. *Id.* at 8. The Supreme Court granted review. *Id.* The State argued, *inter alia*, that the Supreme Court's grant of review should be withdrawn as improvidently granted because Petitioner had, in the original Appellant's Brief, “advocated for application of the case-by-case analysis of what constitutes a reasonable delay in asserting a newly discovered claim,” and then changed his approach in his Reply Brief, “arguing for the first time that any delay less than one year was automatically reasonable.” *Id.* After briefing against the State's brief, at oral argument in the matter, Mr. Lehtinen conceded that the *Pizzuto* case had not been cited in the opening brief, but made argument that it was nevertheless properly considered. *Id.* at 10. Ultimately, the Supreme Court entered an Order Dismissing Appellant's Petition for Review because “the issue this Court initially wanted to address on review was *not* raised in Appellant's opening brief on review [sic] ...” (emphasis in original). *Id.*

Mr. Lehtinen concedes that had he presented the *Pizzuto* argument in petitioner's opening brief on appeal, “presumably the Supreme Court would not have dismissed the petition for review and, instead, would have reached the merits of the *Pizzuto* argument.” *Id.* at 11.

DISCUSSION

An application for post-conviction relief initiates a civil proceeding. *Hall v. State*, 151 Idaho 42, 45 (2011). The summary dismissal of a post-conviction action is permissible when the petitioner fails to raise a genuine issue of material fact that, if resolved in his or her favor, would entitle the petitioner to the requested relief. *Idaho Code* § 19-4906; *Murphy v. State*, 143 Idaho 139, 145 (Ct. App. 2006).

A court may only dismiss a petition when there is no issue of material fact. *Kirkland v. State*, 143 Idaho 544, 546 (Idaho 2006). “*Summary dismissal of an application pursuant to I.C. § 19-4906(b) is the equivalent of summary judgment under I.R.C.P. 56.*” *Dunlap v. State*, 126 Idaho 901, 904 (Idaho App. 1995) (citing *Ramirez v. State*, 113 Idaho 87 (Ct. app. 1987) (emphasis added)).

Like the plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. An application for post-conviction relief differs from a complaint in an ordinary civil action, however, for an application must contain much more than ‘a short and plain statement of the claim’ that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence in not included with the petition. I.C. § 19-4903.

Chouinard v. State, 127 Idaho 836, 838 (Idaho App. 1995) (emphasis added). Thus, when there exists a material issue of fact, summary dismissal of a post-conviction petition is not warranted.

See, e.g., State v. Cobb, 100 Idaho 116 (1979) (The Idaho Supreme Court held that summarily dismissing the post-conviction petition was incorrect because there existed a material issue of fact as to the elements of the petitioner’s claim).

As to successive post-conviction petitioners, Petitioner bears the burden to establish sufficient reason as to why the ground for relief was not asserted in his original petition or was

inadequately asserted in his original petitioner or that any waiver of an asserted claim was not knowingly, voluntarily and intelligently waived. I.C. § 19-4908. As this Court has cited in the Notice of Intent, the Idaho Court of Appeals has stated in relation to successive post-conviction petitions:

All grounds for relief available to an applicant under the UPCPA must be raised in an applicant's original, supplemental, or amended application. I.C. § 19-4908. The language of Section 19-4908 prohibits successive application in those cases where the applicant "knowingly, voluntarily and intelligently" waived the grounds for relief sought in the successive application or offers "no sufficient reason" for omitting those grounds in the original application. See *Palmer v. Dermitt*, 102 Idaho 591, 593, 635 P.2d 955, 957 (1981). *However, Section 19-4908 allows an applicant to raise a ground for relief, which was addressed in a former application, if he or she can demonstrate sufficient reason why that ground was inadequately raised or presented in the initial post-conviction action. See Hernandez v. State*, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999). An allegation that a claim was not adequately presented in the first post-conviction action due to the ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief.

(Emphasis added).

1. PETITIONER HAS ESTABLISHED SUFFICIENT FACTS TO SHOW THAT DAVID HEIDA PROVIDED INEFFECTIVE ASSISTANCE AS PETITIONER'S COUNSEL IN PETITIONER'S 2009 POST-CONVICTION PETITION IN FAILING TO ARGUE FACTS TO SHOW THAT PETITIONER TIMELY FILED THE 2009 POST-CONVICTION PETITION.

Petitioner asserts that he has established sufficient facts to avoid summary dismissal in his allegation that he received ineffective assistance of counsel from David Heida in his 2009 Post-Conviction Petition¹. To establish a claim of ineffective assistance of counsel so as to avoid

summary dismissal, Petitioner must show that there was a genuine issue of material fact on two elements: 1) that Petitioner's counsel's performance fell below an objective standard of reasonableness and 2) that there is a *reasonable probability* that, but for his counsel's errors, the

¹ Petitioner notes that below, in Section 3, Petitioner addresses the procedural application of Petitioner's claim of ineffective assistance of David Heida as counsel under the ruling in *Palmer v. Dermitt*.

result of the proceeding would have been different. *See, generally, Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

First, Mr. Heida's performance fell below an objective standard of reasonableness when he failed to assert a factual basis – and thereby create a factual record – of Petitioner's process in filing his 2009 Post-Conviction Petition. Petitioner, in the least, has created a genuine issue of material fact in the same. Petitioner informed Mr. Heida of the factual basis in his filing of both his 1995 Post-Conviction Petition and the 2009 Post-Conviction Petition as is contained in the *Johnson Affidavit* and is described *supra* and *infra*. However, Mr. Heida never used said information to create a factual record to be the basis of an argument that Petitioner filed his 2009 Post-Conviction Petition within a "reasonable time" as is described *infra*. It is clear that without this factual record, Petitioner could not make an argument on the "case-by-case" basis, as is described *infra*. Thus, it is clear that Mr. Heida fell below an objective standard of reasonableness because any competent counsel would have set forth a factual basis to justify Petitioner's filing of his 2009 Post-Conviction Petition.

Second, there is a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. In the very least, Petitioner has established a genuine issue of material fact in the same with the affidavits of Petitioner, Robert Richard Jones, and Erik Lehtinen. *Charboneau v. State*, 144 Idaho 900, 174 P.3d 870 (2007) sets forth the standard that when a successive petition for post-conviction is filed, the same must be filed within a "reasonable time" of the discovery of information that was not previously known or could not have been known by the petitioner. The Court stated:

In capital cases, this Court has required that successive petitions for post-conviction relief be filed within a reasonable time. (Citation omitted). This "reasonable time" standard is not specifically stated in I.C. § 19-2719, which governs successive petitions in capital cases. Rather, the

reasonable time standard is based on this Court's construction of statutory language barring claims that a defendant knew or reasonably should have known within 42 days after judgment was filed. As the Court has construed I.C. § 19-2719, a defendant may bring claims that he did not know or could not reasonably have known so long as those claims are brought within a reasonable time ... The trial court's analysis of "sufficient reason" permitting the filing of a successive petition must necessarily include an analysis of whether the claims being made were asserted within *a reasonable period of time*. In determining what a reasonable time is for filing a successive petition, we will simply consider it on a *case-by-case basis*, as has been done in capital cases.

Id. at 904-05, 174 P.3d at 874-75 (2007) (Emphasis added).

Petitioner asserts that the facts as set forth herein and in the affidavits of Petitioner and Robert Richard Jones, shows that he filed his 2009 Post-Conviction Petition within a reasonable time, and had Mr. Heida argued the same, Petitioner would have thus survived a challenge of untimeliness from the State during his 2009 Post-Conviction Petition. The facts are as follows:

1. Sometime in 2009, Thomas Peterson, the alleged co-defendant in Petitioner's underlying criminal case, handed Petitioner a notarized confession and provided Petitioner with the information that was the basis for this 2009 Post-Conviction Petition. *Johnson Affidavit* at 2-3. As soon as Petitioner could, he made an effort to contact the paralegal at the ICC, where he was incarcerated at the time, and inquired how to proceed with the new information. *Id.* At that time, Petitioner was aware that ICC no longer employed Inmate Law Clerks (as was the case when he filed the 1995 Post-Conviction Petition, as described *infra*). *Id.*
2. While Petitioner waited for the paralegal to allow his inquiry, Petitioner contacted his aunt, Karen Devine, as soon as he could. *Id.* Petitioner asked his aunt to help find him an attorney that could help Petitioner determine how to proceed with the new information from Mr. Peterson. *Id.* Petitioner's aunt provided Petitioner with addresses of attorneys for Petitioner to contact. *Id.* As soon as Petitioner was able, he wrote letters to all of the

attorneys whose addresses Petitioner's aunt provided. *Id.* After Petitioner was able to meet with the paralegal at ICC, the paralegal informed Petitioner that he was not an attorney and could not give Petitioner advice on what to do or how to proceed. *Id.*

3. Only one attorney replied to Petitioner's letter, Dennis Benjamin. *Id.* Petitioner spoke with Mr. Benjamin on the telephone as soon as he was able and allowed. *Id.* Mr. Benjamin told Petitioner that the proper way to use the new information was to file another post-conviction petition. *Id.* Until his conversation with Mr. Benjamin, which was in May of 2009, Petitioner was unaware that the proper procedure to use the information was to file another post-conviction petition. *Id.* at 4. Also, Petitioner was unaware that he had the legal ability to file a subsequent post-conviction petition after filing his 1995 Post-Conviction Petition. *Id.*
4. At his next available time, Petitioner again visited the paralegal of ICC and requested a packet of documents for post-conviction petitioners. *Id.* Petitioner completed the work on the post-conviction papers, which took some time, despite Petitioner's best efforts to complete the packet. *Id.* It took weeks for Petitioner to request the packet, receive the packet, fill out the information needed in the packet, request an appointment to make copies of the packet, request an appointment in ICC for notary services and to mail out the completed packet. *Id.*
5. On July 29, 2009, Petitioner filed his Successive Petition for Post-Conviction Relief (the "2009 Post-Conviction Petition"), in which Petitioner alleged, in part, that the State had withheld exculpatory evidence in the form of statements of Mr. Peterson that exonerated Petitioner from involvement in the murders.

All of the foregoing facts show that Petitioner was expeditious in seeking out information on how to file the new information with the court, seeking out legal counsel, obtaining the required documents, filling out the documents while being restrained in his actions (from being in custody), and filing the documents with the Court. Because of the expeditious manner in which he completed all of these acts, Petitioner has clearly demonstrated sufficient facts so as to survive summary dismissal – as there is a genuine issue of material fact as to whether Petitioner filed his 2009 Post-Conviction Petition within a “reasonable time”.

Furthermore, in the Notice of Intent, the Court infers that because Petitioner had filed the 1995 Post-Conviction Petition, that he was thus familiar with the process and knew how to use the information as was provided to him by Mr. Peterson. Thus, the Court concludes, “The petitioner, [sic] clearly new [sic] how to go about filing a petition for post-conviction relief.” *Notice of Intent* at 8. However, upon review of the facts in this matter, this inference is not correct, or the Petitioner has at least raised a genuine issue of material fact as to whether the inference is incorrect. The facts supporting this conclusion are as follows:

1. On November 30, 1995, Petitioner filed the “1995 Post-Conviction Petition”. In filing the 1995 Post-Conviction Petition, Petitioner had not individually prepared the documents for the case. *Johnson Affidavit* at 2. Petitioner utilized the services of an Inmate Law Clerk that was provided to him at the Idaho Maximum Security Institution (“IMSI”), where Petitioner was incarcerated at the time. *Id.*
2. In preparing the 1995 Post-Conviction Petition, Petitioner met with the Inmate Law Clerk and explained his underlying criminal case. *Johnson Affidavit*, at 2. At that time, the Inmate Law Clerk explained to Petitioner that the Inmate Law Clerk could help Petitioner. *Id.* The Inmate Law Clerk took from Petitioner the documents that Petitioner

had in regards to his underlying criminal case. *Id.* The Inmate Law Clerk prepared all of the documents for Petitioner's 1995 Post-Conviction Petition. *Id.* Petitioner did not prepare the documents for his 1995 Post-Conviction Petition whatsoever, as he relied on the expertise of the Inmate Law Clerk. *Id.* The Inmate Law Clerk also assisted Petitioner in filing the 1995 Post-Conviction Documents with the Court in Gooding County. *Id.* All of this was a regular practice and procedure of Inmate Law Clerks at that time. *Jones Affidavit* at 1-2.

Petitioner clearly relied entirely on the Inmate Law Clerk in filing his 1995 Post-Conviction Petition. Petitioner had only minimal involvement in filing the 1995 Post-Conviction Petition, and the Inmate Law Clerk handled the matter for him. In contrast, in 2009, Petitioner had virtually no person on whom to rely in helping him file a post-conviction petition. The paralegal at ICC offered him no advice, and Petitioner was completely on his own in determining how to proceed. These facts show a clear contrast in facts in the Petitioner's filing of his two separate post-conviction petitions. As such, Petitioner again asserts that he has raised sufficient facts to raise a genuine issue of material fact as to whether the Court was correct in asserting that Petitioner was familiar with the post-conviction process and knew how to use the information as was provided to him by Mr. Peterson.

For the foregoing reasons, Petitioner asserts that he has established both prongs of proving ineffective assistance of counsel of David Heida in his 2009 Post-Conviction Petition and asks this Court to direct that the proceedings should continue pursuant to Idaho Code § 19-4906(b).

2. PETITIONER HAS ESTABLISHED SUFFICIENT FACTS TO SHOW THAT ERIK LEHTINEN PROVIDED INEFFECTIVE ASSISTANCE AS PETITIONER'S APPELLATE COUNSEL IN PETITIONER'S 2009 POST-CONVICTION PETITION IN FAILING TO CITE *PIZZUTO* IN THE OPENING BRIEF OF PETITIONER'S APPEAL.

In the event that the Court does not find that Petitioner has alleged sufficient facts as to survive summary dismissal as to David Heida's representation of Petitioner in the 2009 Post-Conviction Petition, Petitioner further alleges that Erik Lehtinen was ineffective as Petitioner's counsel on the appeal of 2009 Post-Conviction Petition. Mr. Lehtinen admits in his affidavit that he should have cited and argued *Pizzuto* in his opening brief on appeal. *Lehtinen Affidavit* 11. He also admits that because he did not do so, the Idaho Supreme Court denied the review of Petitioner's case. *Id.* He finally states, "As the *Pizzuto* argument is a meritorious one, which may have ultimately been adopted, and as the petition and [its] supporting material raised a genuine issue of material fact as to whether the State wrongfully withheld exculpatory evidence, there is a reasonable probability that the appeal would have turned out differently had I explicitly raised the *Pizzuto* argument in the opening brief on appeal." *Id.*

Thus, Petitioner has raised at least a genuine issue of material fact as to whether he has satisfied the two prongs of *Strickland* in proving ineffective assistance of counsel, Mr. Lehtinen, at the appellate level of the 2009 Post-Conviction Case.

3. THE DOCTRINES OF RES JUDICATA AND LAW OF THE CASE DO NOT APPLY UNDER THE RULING IN *PALMER V. DERMITT*, WHICH HAS BEEN FOLLOWED NUMEROUS TIMES BY THE APPELLATE COURTS IN IDAHO.

Petitioner in this matter must be allowed to proceed to seek a finality of the issues raised in his 2009 Post-Conviction Petition under *Palmer v. Dermitt*, 102 Idaho 591, 593, 635 P.2d 955, 957 (1981), which does not violate the doctrines of Res Judicata or Law of the Case. In *Palmer*, the Idaho Supreme Court considered allegations by Palmer that his original post-conviction

counsel was ineffective, which warranted his ability to bring again his post-conviction arguments until finality was reached on the issues of the arguments. *Id.*

Under what the Court deemed the “finality rule”, the Court allowed Palmer to reassert his arguments anew. The Court, in considering the language of Idaho Code § 19-4908, related the words of the American Bar Association Standards Relating to Post-Conviction Remedies, which state, in part, “(ii) *A question has been fully and finally litigated when the highest court of the state to which a defendant can appeal as of right has ruled on the merits of the question. Finality is an affirmative defense to be pleaded and proved by the state.* (b) Claims advanced in post-conviction applications should be decided on their merits, even though they might have been, but were not, fully and finally litigated in the proceedings leading to the judgments of conviction.” *Id.* (Emphasis added). The Court finally ruled:

The allegations of ineffective assistance of prior post-conviction counsel, if true, would warrant a finding that the omission in the prior post-conviction proceeding of the allegations now being raised anew by Palmer was not a result of an active, knowing choice made by Palmer through this prior court-appointed attorney, and would therefore provide sufficient reason for permitting the newly asserted allegations to be raised in the instant petition. Other jurisdictions have similarly held that a claim of ineffective assistance of appellate counsel or prior post-conviction counsel provides sufficient reason to permit newly asserted allegations to be raised in a subsequent post-conviction proceeding. See *Sims v. State*, 295 N.W.2d 420 (Iowa 1980); *Curtis v. State*, 37 Md. App. 459, 381 A.2d 1166 (1978) rev'd on other grounds; *Stewart v. Warden, Nevada State Prison*, 92 Nev. 588, 555 P.2d 218 (1976).

Id. at 596, 635 P.2d at 960 (1981) (Emphasis added).

It is important to note that in *Palmer*, the Idaho Supreme Court ruled that an issue on which Palmer had reached finality by taking through the appellate process – the felony impeachment rule – must be barred by the doctrine of the Law of the Case. *Id.* at 595, 635 P.2d at 959 (1981). However, on the issues that Palmer was denied finality because his prior post-

conviction counsel was ineffective, the Idaho Supreme Court ruled that the district court erred in summarily dismissing the issues (and did not render the issues warrantless under the doctrines of Res Judicata or Law of the Case). *Id.* at 596, 635 P.2d at 960 (1981). As such, the only logical inference is that the finality rule as set forth in *Palmer* – which allows a post-conviction petitioner to proceed on claims he has brought forth in a prior post-conviction petition – does not violate the principles of Res Judicata or Law of the Case.

The finality rule in *Palmer* has been followed in other Idaho cases. *See Hernandez v. State*, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999); *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005) (“An allegation that a claim was not adequately presented in the first post-conviction action due to the ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief.”); and *Schwartz v. State*, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008) (“failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process.”) Petitioner notes that the Court in this matter cited all of the above referenced cases in the Notice of Intent. *See Notice of Intent*, 4, 5, and 10.

In this matter, Petitioner has set forth his argument that David Heida, his attorney on his 2009 Post-Conviction Petition, was ineffective in failing to argue the facts and establish that Petitioner filed his 2009 Post-Conviction Petition within a “reasonable time” so as to survive summary dismissal as set forth *supra*. Pursuant to *Palmer*, Petitioner seeks to reassert all of the grounds that were ruled to be untimely in his 2009 Post-Conviction Petition by the Idaho Court of Appeals, so as to seek finality of his claims on the merits. As such, Petitioner requests that the Court direct that the proceedings should continue pursuant to Idaho Code § 19-4906(b).

Additionally, Petitioner has set forth his argument that Erik Lehtinen, his appellate attorney on his 2009 Post-Conviction Petition, was ineffective in failing to cite *Pizzuto* in Petitioner's opening appellate brief. In the event that the Court does not believe that Petitioner has adequately proven sufficient facts so as to survive summary dismissal on the timeliness issue – and that Mr. Heida provided ineffective assistance of counsel on the same – pursuant to *Palmer*, Petitioner seeks then to reassert all of the ground that were ruled to be untimely in his 2009 Post-Conviction Petition by the Idaho Court of Appeals, so as to seek finality of his claims on the merits by being able to include an argument under *Pizzuto* that a “reasonable time” standard in non-capital cases should be defined in terms of usual statute of limitations in non-capital post-conviction cases, i.e., one year. As such, Petitioner requests that the Court direct that the proceedings should continue pursuant to Idaho Code § 19-4906(b).

Petitioner finally notes that his present counsel, Steven R. McRae, has not had an opportunity to prepare an amended petition or a motion to amend the petition in this matter, given his limited appointment as set forth in *Order re: Appointment of Counsel* filed on April 22, 2013. As such, Petitioner requests that the Court allow Mr. McRae the ability to propose an amended petition under the guidance provided herein pursuant to Idaho Code § 19-4906(b), with at least four (4) weeks to prepare the same.


CONCLUSION

For the foregoing reasons, Petitioner requests that the Court, pursuant to Idaho Code § 19-4906(b) direct that the proceedings continue. Petitioner further asks that the appointment of Steven R. McRae be expanded to allow Mr. McRae the ability to propose an amended petition under the guidance provided herein pursuant to Idaho Code § 19-4906(b), with at least four (4)

weeks to prepare the same. Additionally, Petitioner requests an oral hearing on this matter for all issues raised.

DATED this 3rd day of July, 2013.

McRAE LAW OFFICE, PLLC

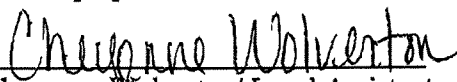
By: 
Steven R. McRae
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of July, 2013, I served a true and correct copy of the within and foregoing document upon the following:

Gooding County Prosecutor
P.O. Box 86
Gooding, ID 83330
Fax: (208) 934-4494

☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☒ Facsimile


Cheyenne Wolverton/ Legal Assistant

STATE OF IDAHO)
 :ss
County of Ada)

COMES NOW Erik R. Lehtinen, and swears and affirms under oath and upon his personal knowledge the following:

1. I am currently employed by the Idaho State Appellate Public Defender ("SAPD") as the Chief of the Appellate Unit. I have served in this capacity for over a year. Prior to that, I served as a Deputy State Appellate Public Defender for approximately eight years.
2. On or about February 3, 2010, the SAPD was appointed to represent Robert Terry Johnson in his appeal from the district court's summary dismissal of his petition for post-conviction relief in Gooding County Case No. CV 2009-399 (originally designated Supreme Court No. 37378; later re-designated Supreme Court No. 39433).
3. Originally, Mr. Johnson's appeal was assigned to another attorney at the SAPD (Sarah Tompkins); however, well before the Appellant's Brief was filed, the case was re-assigned to me. From that point forward, I had exclusive responsibility for Mr. Johnson's appeal.
4. Based on my work as Mr. Johnson's appellate counsel, I have personal knowledge of all matters set forth herein.
5. Upon reviewing the Clerk's Record and Reporter's Transcript, I came to the belief that the district court erred in summarily dismissing Mr. Johnson's *Brady* claim. Thus, the claim presented on appeal was stated as follows: "Did the district court

err in summarily dismissing the *Brady* claim presented in Mr. Johnson's successive petition for post-conviction relief?"

6. In arguing this claim in the Appellant's Brief, there were three arguments that I felt needed to be made: first, it had to be made clear that Mr. Johnson's petition (and the supporting materials) raised a genuine issue of material fact which, if resolved in his favor, would have established a *Brady* violation which would have entitled him to post-conviction relief; second, there was need to explain why Mr. Johnson's *Brady* claim was properly presented in a successive petition for post-conviction relief; and third, because the district court seemed to have dismissed Mr. Johnson's *Brady* claim, in part, on timeliness grounds, a brief explanation of why that claim was, in fact, timely, was warranted.
7. At the time, I did not view the timeliness issue as a serious impediment to Mr. Johnson obtaining relief. This was so for two reasons:
 - a. First, below, the State had not made a credible or compelling argument contesting the timeliness of the *Brady* claim (see Brief in Support of Motion for Summary Disposition – Dismissal, pp.14-15 (Oct. 13, 2009) (citing one Idaho case holding that a successive petition filed within 42 days of learning of the facts underlying the claim was filed within a "reasonable time," and citing another case holding that a successive petition filed four years after learning of the relevant facts was not filed within a "reasonable time"); Subsequent Brief in Support of Motion for Summary Disposition – Dismissal, pp.12-13 (Dec. 24, 2009) (arguing that the *Brady* material at issue was known to Mr. Johnson as of the date of his

preliminary hearing back in 1993)); Mr. Johnson's successive post-conviction counsel (David Heida and Isaac Keppler) never made a record of why it took Mr. Johnson approximately four months to file his successive petition after receiving evidence of the *Brady* violation; and the district court appeared not to have been totally convinced that the *Brady* claim was untimely (see Memorandum Decision and Order Re: Motion for Summary Dismissal, pp.29-30 (discussing the fact that Mr. Johnson's successive petition was filed approximately four months after receiving evidence of the *Brady* violation; noting that the relevant legal question was whether the petition was filed within a "reasonable time" of learning of the *Brady* violation; acknowledging that, "[a]s to the *Brady* violation, it is less clear whether it is untimely"; and never explicitly ruling that the *Brady* claim was, in fact, untimely)).

- b. Second, and much more importantly, I did not perceive there to be a remotely credible argument that Mr. Johnson's successive petition was not filed within a "reasonable time." I firmly believed that the filing of a successive post-conviction petition by an indigent, incarcerated, *pro se* petitioner within approximately four months of receiving evidence of a *Brady* violation in his criminal case was infinitely reasonable under any colorable standard for defining a "reasonable time." In part, this was because I was aware of no Idaho appellate decision which had ever held that post-conviction petition in a non-capital case, filed after a delay significantly less than a year, was filed outside of a "reasonable time."

Specifically, the shortest time period I was aware of, in which it had been said in a non-capital case that a time period less than a year was not a "reasonable time," was the 51 weeks considered to be unreasonable in *Schwartz v. State*, 145 Idaho 186, 191-92 (Ct. App. 2008).

8. Because I did not perceive there to be a credible argument that Mr. Johnson's successive petition was time-barred as not having been filed within a "reasonable time," in the Appellant's Brief, I addressed the timeliness issue somewhat cursorily, simply identifying the applicable "reasonable time" standard, and pointing out that under the basic facts of Mr. Johnson's case a successive petition filed within approximately four months was clearly filed within a "reasonable time." (See Appellant's Brief, pp.33-34.) At the time, I was aware that the "reasonable time" standard was problematic because it was poorly defined under Idaho law; however, I saw no need to open "Pandora's Box" by trying to define the "reasonable time" standard because, as noted, I believed it beyond cavil that Mr. Johnson's successive petition was filed within a "reasonable time" under any colorable interpretation of that standard.
9. I was quite surprised when I received the State's Respondent's Brief in Mr. Johnson's appeal, and discovered that the State's primary argument on appeal was that Mr. Johnson's successive petition had been properly dismissed because Mr. Johnson failed to establish that he filed his petition within a "reasonable time." (See Respondent's Brief, pp.8-10.) In making this argument, the State contended that what is a "reasonable time" is evaluated on a case-by-case basis and that, in the absence of some affirmative explanation on the record

of why it took him four months to file his successive petition, Mr. Johnson failed to show, under the facts of his case, that his petition was filed within a reasonable time. (See Respondent's Brief, pp.8-10.)

10. The State's focus on the timeliness of Mr. Johnson's petition and, in particular, its claim that under the unique facts of circumstances of his case he had failed to show that his petition was filed within a "reasonable time," necessitated a discussion of just what the "reasonable time" standard means, and how it ought to apply to Mr. Johnson's case. Thus, in preparing Mr. Johnson's Reply Brief, I had to delve into "Pandora's Box."
11. In the Reply Brief, I argued that a "reasonable time" should no longer be judged on a case-by-case basis because, although *Charboneau v. State*, 144 Idaho 900 (2007), had required as much in non-capital cases, a year later, in *Pizzuto v. State*, 146 Idaho 720 (2008), a capital case, the Idaho Supreme Court had recognized that a case-by-case approach to determining whether a post-conviction petition was filed within a "reasonable time" is problematic, and it abandoned that approach (at least in capital cases) and applied the statutory time limit for bringing post-conviction claims generally—in that case, 42 days, as set forth under I.C. § 19-2719, the capital post-conviction statute. Accordingly, I argued that a "reasonable time" for Mr. Johnson to have filed his successive petition should be measured by the statutory time limit for bringing post-conviction claims generally as well—one year, as set forth under I.C. § 19-4902, the non-capital post-conviction statute. Alternatively, I argued that even if the *Pizzuto* reasoning did not apply to non-capital cases, such that the question of

whether Mr. Johnson's petition was filed within a "reasonable time" had to be judged on the unique facts and circumstances of his case, the reality is that Mr. Johnson's filing of a successive petition in only about four months was reasonable.

12. With regard to the latter (alternative) argument, although I believed it unquestionable that the approximately four months at issue in this case was well within a "reasonable time" for an indigent incarcerated *pro se* petitioner to file a successive petition (see ¶ 7(b), *supra*), the fact is that when I realized the State was actually going to pursue the "timeliness" issue, I regretted that I did not have a record of the specific reasons why it took Mr. Johnson approximately four months to file his successive petition. I knew (because, throughout the pendency of the appeal, Mr. Johnson repeatedly explained it to me) exactly why it took Mr. Johnson a number of months to file his successive petition; however, because those reasons were never placed into the record by Mr. Johnson's successive post-conviction counsel, I was forbidden from discussing them on appeal. See, e.g., *Nelson v. Nelson*, 144 Idaho 710, 714 (2007).
13. In particular, Mr. Johnson told me that when he first learned of the *Brady* evidence/violation, he had no idea what to do with it. He told me he did not know what to file (*i.e.*, a motion in his criminal case, a motion in his first post-conviction case, a new petition for post-conviction relief, a petition for a writ of *habeas corpus*, or some other document), or where to file it (*i.e.*, in state court or in federal court). If I recall correctly, he said he wasted a significant amount of time trying to hire an attorney himself; then, when that failed, he tried to get advice

from his family; and, finally, he relied on his family to try to hire an attorney, which also failed. All of this would have been time-consuming under the best of circumstances, but for reasons which should be obvious, Mr. Johnson indicated it was an extraordinarily difficult and slow process for him while he was incarcerated and without funds. Ultimately, Mr. Johnson said, these efforts were all unsuccessful. He then attempted to seek assistance from the prison paralegal, he said. If I recall correctly, Mr. Johnson indicated that he had to wait weeks for his appointments with the paralegal and, making matters worse, I believe he told me that he needed multiple appointments with the paralegal before he was in a position to start putting the successive petition together. Had this information been made part of the record below, such that it would have been proper for me to present it on appeal, I certainly would have presented this information in response to the State's "timeliness" argument. Nevertheless, I still firmly believed that our briefing demonstrated that Mr. Johnson's successive petition was timely filed regardless of which standard might apply.

14. Mr. Johnson's case was originally assigned to the Court of Appeals, which declined the State's request for oral argument.

15. In an unpublished opinion, the Court of Appeals affirmed the district court's summary dismissal of Mr. Johnson's successive petition. It reasoned that Mr. Johnson's successive petition was untimely. With regard to the question of

how to define a "reasonable time," the Court of Appeals declined to extend the reasoning of *Pizzuto* to non-capital cases, holding as follows: "While *Charboneau* was decided one year prior to *Pizzuto*, the Court's decision in *Pizzuto* was limited

to capital cases and did not expressly overrule *Charboneau's* reasonable time standard for successive applications filed in noncapital cases. Thus, we decline to extend the rationale of *Pizzuto* to conclude that a reasonable time for filing a successive application in a noncapital case is one year." Applying a case-by-case approach, the Court of Appeals concluded, without any analysis whatsoever, that "Johnson has failed to establish that he filed his successive application within a reasonable time."

16. To this day, I respectfully disagree with the Court of Appeals' conclusions—both its continued adherence to *Charboneau*, even after *Pizzuto*, and its conclusory holding that approximately four months was not a "reasonable time" for Mr. Johnson to have filed his successive petition. With regard to the latter holding, although I believe the Court of Appeals was incorrect to have held that the approximately four months at issue was not a "reasonable time" based on the record before the it, I believe that the Court of Appeals may have reached a different conclusion had I had a better record detailing the specific reasons why Mr. Johnson's successive petition was not filed until approximately four months after his discovery of the *Brady* evidence/violation.
17. Following issuance of the Court of Appeals' opinion, I filed a timely petition for review with the Idaho Supreme Court. In the brief supporting that motion, I argued that review should be granted in order for the Supreme Court to resolve the question left unanswered in *Pizzuto*—whether the "reasonable time" standard in non-capital cases should be defined in terms of usual statute of limitations in non-capital post-conviction cases, *i.e.*, one year.

18. The Supreme Court granted review.
19. In its Respondent's Brief on Review, the State argued, *inter alia*, that the Court's grant of review should be withdrawn as improvidently granted because Mr. Johnson had, in the original Appellant's Brief, "advocated for application of the case-by-case analysis of what constitutes a reasonable delay in asserting a newly discovered claim," and then changed his approach in his Reply Brief, "arguing for the first time that any delay less than one year was automatically reasonable." Therefore, the State reasoned, "the Idaho Court of Appeals ultimately applied the legal standard advocated by Johnson on appeal." On the "timeliness" issue, the State also argued that, contrary to what had been argued in the Appellant's Brief in Support of Petition for Review, this area of the law is "settled" and the reasoning of *Pizzuto* does not apply to non-capital cases, and that, under the facts and circumstances of his case, Mr. Johnson failed to show that his petition was filed within a "reasonable time."
20. The State's Respondent's Brief on Review warranted a response. Thus, I filed an Appellant's Reply Brief on Review. In that brief, I argued that review had not been improvidently granted. I pointed out that the State was incorrect insofar as it claimed that a case-by-case approach to determining whether a successive petition was filed within a "reasonable time" had been "advocated" in the original Appellant's Brief, and I argued why the State's "invited error" and waiver/forfeiture theories were without legal merit. I also explained why the State's argument that the law in this area is "settled" was without merit. Finally,

turning to the question of whether Mr. Johnson's petition was, in fact, filed within a "reasonable time," I refuted the State's arguments on this point.

21. The Supreme Court heard an oral argument in Mr. Johnson's case. At that argument, Justice Eismann questioned me at some length concerning the question of whether my *Pizzuto*-related argument was adequately raised in the original Appellant's Brief and, thus, properly before the Court. I conceded (as I had in the briefing) that the *Pizzuto* case had not been cited in the opening brief, but attempted to argue that the *Pizzuto*-related argument was nevertheless properly considered because it was nothing more than an attempt to define the "reasonable time" standard, which undoubtedly had been argued in the original Appellant's Brief. Justice Eismann, however, had no patience for my argument in this regard, as he repeatedly cut off my attempted explanation, and at least once accused me of "lying" to the Court. After the argument, Justice Eismann refused to shake my hand, as is customary for the Court and, instead, again accused me of having lied to the Court.
22. Ultimately, the Supreme Court entered an Order Dismissing Appellant's Petition for Review. The Court ruled that review had been improvidently granted because "the issue this Court initially wanted to address on review was *not* raised in Appellant's opening brief on review [sic]" (emphasis in original). The only logical inference is that the Court was referring to the question of whether the rationale of *Pizzuto* should be applied non-capital cases, such that a "reasonable time" for filing a successive post-conviction petition in a non-capital case should be deemed to be one year from discovery of the facts underlying the claim(s)

presented therein, and it meant to say that the issue was not properly before the Court because it was not raised in Mr. Johnson's original Appellant's Brief.

23. Looking back at Mr. Johnson's appeal now, I disagree with the Supreme Court's conclusion that the argument presented to the Supreme Court was not properly raised before the Court of Appeals. I believe that the argument concerning *Pizzuto*, because it was an attempt to define the "reasonable time" standard, was fairly encompassed within the argument made in Mr. Johnson's very first brief—that his successive petition was filed within a "reasonable time." Nevertheless, the Supreme Court has spoken on this issue, and it has concluded that the potentially meritorious argument concerning *Pizzuto* was not raised in the opening brief, as it should have been.
24. Had I presented the *Pizzuto* argument in Mr. Johnson's opening brief on appeal, presumably the Supreme Court would not have dismissed the petition for review and, instead, would have reached the merits of the *Pizzuto* argument.
25. As the *Pizzuto* argument was a meritorious one, which may have ultimately been adopted, and as the petition and its supporting materials raised a genuine issue of material fact as to whether the State wrongfully withheld exculpatory evidence, there is a reasonable probability that the appeal would have turned out differently had I explicitly raised the *Pizzuto* argument in the opening brief on appeal.

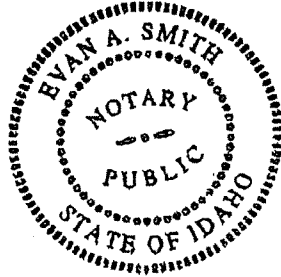
Dated this 1st day of July, 2013.



ERIK R. LEHTINEN
Chief, Appellate Unit

STATE OF IDAHO)
 :ss
County of Ada)

SUBSCRIBED AND SWORN to before me on this 1st day of July, 2013.



A handwritten signature in black ink, appearing to be "Evan A. Smith", written over a horizontal line.

NOTARY PUBLIC FOR IDAHO
Residing in Boise, Idaho
Commission Expires 2/12/2016

DISTRICT COURT
GOODING CO. IDAHO
FILED

2013 JUL -3 PM 2:56

GOODING COUNTY CLERK

BY: *CRJ*
DEPUTY

Steven R. McRae [ISB No. 7984]
McRAE LAW OFFICE, PLLC
P.O. Box 1233
Twin Falls, ID 83303-1233
Telephone No. (208) 944-0755
Facsimile No. (208) 736-0041
e-mail: SMcRae@MagicValleyLegal.com

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF GOODING

ROBERT JOHNSON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-2013-0000084

**AFFIDAVIT OF ROBERT
RICHARD JONES**

STATE OF IDAHO)

)ss.

County of Ada)

ROBERT RICHARD JONES, being first duly sworn upon oath, deposes and states:

1. I am over the age of eighteen (18) and am of sound mind to make this affidavit.
2. I am presently an inmate in the Idaho Correctional Center, and I have been an inmate under the supervision Idaho Department of Corrections since my sentencing in Canyon County Case No. CR-1989-13922-C on June 24, 1991.


AFFIDAVIT OF ROBERT RICHARD JONES

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3. While in the prison system, I have been employed in different positions.
4. From about or around 1991 through 1998, I was employed as an "Inmate Law Clerk" ("ILC") in the prison system at both the Idaho Maximum Security Institution ("IMSI") (from about or around 1991 through 1995) and the Idaho State Correctional Institute ("ISCI") (from about or around 1995 through 1998).
5. For example, attached hereto as Exhibit A is a true and correct copy of my case load sheet in 1995 to 1996 as I worked as an ILC at that time.
6. I am well aware of the practices and procedures of the ILCs in IMSI and ISCI during the periods in which I served as an ILC.
7. While employed as an ILC, I, as well as other ILCs, would meet with inmates that had legal inquiries, including but not limited to post-conviction inquiries.
8. When I or another ILC met with an inmate, we would determine whether or not we could assist the inmate.
9. If I or another ILC determined that we could assist the inmate, we would either provide advice to the inmate, or we would draft the required legal documents for the inmate.
10. If I or another ILC determined that we would draft the required legal documents for an inmate, it was often the normal practice that the inmate had very little involvement in the process and relied on our knowledge as ILCs to prepare the legal documents.
11. I am aware now that sometime in the late 1990's, the Idaho Department of Corrections quit employing inmates as ILCs.
12. To my knowledge, in 2009, the Idaho Correctional Center no longer employed inmates as ILCs.


DATED this 27th of June, 2013.


Robert Richard Jones

SUBSCRIBED and SWORN to before me this 27th day of June, 2013.

12

JAMES G. QUINN
NOTARY PUBLIC
STATE OF IDAHO


NOTARY PUBLIC FOR IDAHO
Residing at: N/A
Commission Expires: 9/10/2013

Sheet1

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NAME	IDOC #	CLERK	DATE	CASE TYPE	REASON ASSIGNED	STATUS (filings, hearings)
Chaffin, Robert	21194	Arellano 22	2/23/96	appeal and post conv	complex	
Madrid, Victor	42230	Arellano 22	2/5/96			
Day, Donald	35749	Brink 18964	5/13/96			
Wolf, Steven	16514	Brink 18964	5/6/96			
Brazzell, J.	27467	Cootz 1599	2/5/96			
Aschenbrenner	27407	Drennon, 3	1/4/96	post conviction	complex	
Bruce, Richard	20120	Drennon, 3	12/12/95			
Ashley, Anthony	41071	Galaviz	2/23/96	Appeal	complex	
Moore, Mickey	47350	Galaviz	3/8/96	post conv	complex	
Prieto, David	37321	Galaviz	2/5/96	paternity		
Stewart, Arnold	40771	Galaviz	2/1/96	1983	illiterate	
Wills, Robin	26730	Galaviz	1/19/96	Federal Habeas	complex	
Carter, Jason	39435	Galviz	12/20/95	1984	Carter never provided paperwork	
Delisle, Shon		Hargis		Child Support mod.	under supervision of Jones	
Hernandez, Benito		Hargis	12/18/95	Rule 35	to prepare papers only	
Mulvihill, Harold	46773	Hargis	12/11/95	Rule 35	12/18 deadline, "psych pr	Mulvihill at yard, file sent to yard 12/2
Swogger, James	37753	Hargis	12/14/95	credits for time served	prepare mtn	
Babb		Jones		Federal Habeas		
Bacus		Jones		PCR Appeal		
Brown		Jones		1983		
Brown		Jones		1983		
Cagle		Jones		1983		
Goodline		Jones		1983		
Guzman		Jones		Pet for Rehearing		
Hoffman		Jones		Habeas		
Hyde		Jones		1983		
Jackson, Theodore	47838	Jones	1/19/96	parental rights	complex	expires 3 weeks
Jones		Jones		1983		
Jones		Jones		PCR Appeal		
Kerrigan		Jones		Post Conv.		
Knulson		Jones		Civil Action		
Martinez		Jones		1983 (Class)		
Merrifield		Jones		Divorce		

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Monroe		Jones		1983			
Player		Jones		Living Will			
Reyes		Jones		Habeas			
Romero		Jones		Rule 35 illegal sent			
Sanders		Jones		Post Conv.			
Walker		Jones		Appeal Habeas			
Walker		Jones		Rule 35 illegal sent			
Milton, C	17199	Matthews 3	1/30/96	post conv	complex		
Peel, Jack	48192	Priest	4/15/96		complex		
Garner, Gary	20065	Priest 1865	6/10/96	parole hrg	complex		
Taylor	18681	Ray 16737	2/26/96	Habeas	complex		
Baccus		Roman		Rule 35 illegal sent			
Moreno, Roberto	38166	Roman	1/12/96	dismiss atty, appt ne atty			
Schneider, Joey	20279	Roman	1/5/96		1-20 deadline for filing		
Williams, Bart	34211	Strolberg	3/12/96		complex		
Bujanda, Jesus					not assigned, has atty		
Carter,			12/18/95		not assigned per Jones put in request 4 wks ago, never rec'd tol		
Steele		Priest	7/17/96				

Steven R. McRae [ISB No. 7984]
 McRAE LAW OFFICE, PLLC
 P.O. Box 1233
 Twin Falls, ID 83303-1233
 Telephone No. (208) 944-0755
 Facsimile No. (208) 736-0041
 e-mail: SMcRae@MagicValleyLegal.com

DISTRICT COURT
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BY:

DEPUTY

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF
 IDAHO, IN AND FOR THE COUNTY OF GOODING

ROBERT JOHNSON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-2013-0000084

**PARTIAL SUPPLEMENTAL
 AFFIDAVIT OF ROBERT JOHNSON**

STATE OF IDAHO)

)ss.

County of Ada)

ROBERT JOHNSON, being first duly sworn upon oath, deposes and states:

1. I am over the age of eighteen (18) and am of sound mind to make this affidavit.

~~2. I am the Petitioner in the above-entitled document. I make this affidavit to further~~

explain the process that I went through in filing my two prior post-conviction cases.

3. I filed my first post-conviction case on November 30, 1995 (the "First Post-Conviction Case".)

PARTIAL SUPPLEMENTAL AFFIDAVIT OF ROBERT JOHNSON

4. When I filed the First Post-Conviction Case, I did not individually prepare the documents for the case. In fact, I had used the services of an Inmate Law Clerk that was provided to me at the Idaho Maximum Security Institution ("IMSI"), where I was housed at the time, and the Inmate Law Clerk prepared all of the documents that I filed to initiate the First Post-Conviction Case.

5. I met with an Inmate Law Clerk and explained my underlying criminal case. At that time, the Inmate Law Clerk explained to me that he could help me and took from me the documents that I had in regards to my underlying criminal case.

6. The Inmate Law Clerk prepared all of the documents for my First Post-Conviction Case. I did not prepare the documents whatsoever and relied on the expertise of the Inmate Law Clerk, who also assisted me in filing the documents in Gooding County.

7. My First Post-Conviction Case was summarily dismissed on June 13, 1996, which dismissal was affirmed by the Idaho Court of Appeals in July of 1997.

8. Sometime in 2009, Thomas Peterson, the alleged co-defendant in my underlying criminal case, handed me a notarized confession, a true and correct copy is attached hereto as Exhibit A.

9. At the time that Mr. Peterson gave me the notarized confession, he informed me that he had confessed to the crimes that I was charged with and confessed that I was a victim on the night in question— which confession was on an audio tape — before we were charged with the crime of murder as co-defendants, and that he had confessed to his lawyers, including Severt Swenson.

10. Mr. Peterson also told me that Mr. Phillip Brown, the Gooding County Prosecutor at the time of my underlying criminal case, knew that I was a victim the night that Mr. Peterson committed the murders.

11. Mr. Peterson told me that he had an agreement with Mr. Swenson and Mr. Brown to point the finger at me to save himself from the death penalty in Mr. Peterson's case.

12. I was unaware of any of the foregoing information, including the existence of a confession on audio tape, until Mr. Peterson gave me the notarized confession and provided me with the information.

13. I did not know what to do with this new information from Mr. Peterson or the proper legal procedure to use the new information.

14. As soon as I could, I contacted the paralegal at the Idaho Correctional Center ("ICC") and inquired how to proceed with the new information, as I knew at that time that ICC no longer employed Inmate Law Clerks.

15. The paralegal at ICC informed me that he was not an attorney and could not give me advice on what to do.

16. As I was waiting to speak with the paralegal at ICC, I contacted my aunt, Karen Devine, as soon as I could. I asked her to help me find an attorney that could help me determine how to proceed with the new information.

17. My aunt provided me with addresses of attorneys for me to contact. As soon as I was able, I wrote letters to all of the attorneys whose addresses my aunt provided.

18. Only one attorney replied to me, Dennis Benjamin. I spoke with Mr. Benjamin on the telephone as soon as I was able, and he told me that the proper way to use the new information was to file another post-conviction petition.

PARTIAL SUPPLEMENTAL AFFIDAVIT OF ROBERT JOHNSON

19. Until my conversation with Mr. Benjamin, which was in May of 2009, I was unaware that the proper procedure to use the information was to file another post-conviction petition, and I was also unaware that I was legally able file a second post-conviction petition after filing the First Post-Conviction Petition.

20. At my next available time, I again visited the paralegal of ICC and requested a packet of documents for post-conviction petitions.

21. It took some time for me to request the packet, receive the packet, fill out the information needed in the packet, request an appointment to make copies of the packet, request an appointment in ICC for notary services, and to mail out the completed packet.

22. I took all of the actions described herein as soon as I was able; however, the process still took weeks to complete given that I no longer had an Inmate Law Clerk to assist me with my legal document, my lack of resources, and the constraints of my actions in ICC.

23. I informed my attorney, David Heida, who represented me in my subsequent post-conviction petition, all of the information as contained herein.

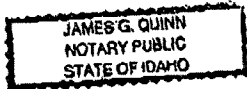
24. Mr. Heida did not use the information as contained herein in representing me in my subsequent post-conviction petition, and specifically in arguing that I filed my post-conviction petition in a timely manner.

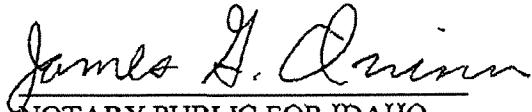
DATED this 27 of June, 2013.



Robert Johnson

SUBSCRIBED and SWORN to before me this 27th day of June, 2013.





NOTARY PUBLIC FOR IDAHO
Residing at: N/A
Commission Expires: 9/10/2013

Affidavit

I, Thomas R Petersen, Make the following Voluntary Statement from my personal knowledge of the events describe in this Document and is stated by my own free will. With out Coersion or threats and is true and correct by the best of my Recollection.

I am 39 years old and am currently under the care and custody of the I.D.C.C.

I have personal knowledge of the Double Murder and the events that surround it. in which both myself and Robert Johnson, my codefendant are convicted of.

I make this Statement because of the interegation of me by gooding ~~County~~ ^{the} officers and the prosecutor, and the wrongful Conviction of Robert Johnson.

Robert Johnson is not Guilty of murder, or any crime involving the two murders that I am convicted of.

Robert Johnson was very Drunk that Night the Crime happened, to the point of barely walking and his speech was almost ununderstandable.

No Crime was planed or spoken of before going to Maghams and Allens house.

I told Johnson that I sold Allen some pot and that we were going to pick up the rest of what was owed.

At the house Maghams became upset with Allen because he did not want the Drugs. But paid me anyway. He continued to get upset, until the punches flew between the three of us.

Johnson tried to help but he fell in the attempt. I Grabed a fire Iron from amongst a nearby pile of tools and began to swing.

From that point on I took Charge, and threatened every one including Johnson, and told them to get on the floor.

The injuries, the tying and cutting were done by me. I forced Johnson, with threats of Death, by swinging the fire Iron at him and pushing him around to Assist.

EXHIBIT

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He was Verry drunk and crying Alot, so his actions were actually off no help and made me even more angry.

Johnson kept yelling things at what seemed like Nobody and I could only make out the word "no".

Anything he did that night was because I forced him to and I made it Very Clear I would kill him if he didn't do what I said.

After we left the house Johnson Vomited in the front yard and then tried to run from me. I grabbed him and told him that it was now over but if he said anything I would kill him. Johnson became very quiet after that.

Amie Petersen, my sister, is the person who helped me get rid of the evidence after the crime.

All of this information was given to the Gooding County Prosecutor and other investigators.

During my interigation in the Blain County Jail.

I told them the truth but they told me I would die if I stayed with that story. They read notes to me and explained what I needed to say if I wanted to live.

They had me lie by pointing the finger at Johnson and changing my story to fit what they thought happened. They said that if my story didnt involve both Johnson and me, they would not settle for anything less than the Death penalty.

I told both of my lawyers this but they did nothing.

My lawyers told me what to say and what to do to ~~the~~ point at Johnson and said that the prosecutor would only Drop the Death penalty if I followed there instructions.

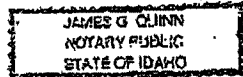
I've never spoke to Johnson about any of this and I never told him of where to find the evidence to prove this.

I told Johnson that the evidence was wrong and that he needed to go to Court on those facts. I told him I would only say the truth in Court and only if I was asked in Court. Johnson is a victim and I have continued to let him be a victim until now. I need the truth to come out and I need to stop making Johnson pay for my crimes.
Further the affiant sayeth not

Dated this 10th day of March 2009

Thomas R. Petersen
Thomas R. Petersen

Subscribed and Sworn and Affirmed to before me
this 10th day of March 2009



James G. Quinn

Notary Public for Idaho
Commission expires 9/10/09

DISTRICT COURT
GOODING CO. IDAHO
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2013 JUL 31 AM 9:45

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

GOODING COUNTY CLERK

BY: *[Signature]*
DEPUTY

ROBERT JOHNSON,)	
)	
Petitioner,)	
)	
vs.	)	Case No. CV-2013-84
)	
STATE OF IDAHO,)	
)	
Respondent.)	
)	

MEMORANDUM DECISION RE: NOTICE OF INTENT TO DISMISS

On February 14, 2013, the Petitioner, Robert Johnson, filed his Second Successive Petition for Post-Conviction Relief. The Court issued its Notice of Intent to Dismiss on March 12, 2013. On March 26, 2013 the Court granted to the Petitioner an additional 30 days within which to respond to the Court's Notice of Intent to Dismiss. On March 29, 2013 the Petitioner filed his Response to Notice of Intent to Dismiss. The Petitioner after March 29, 2013 had not filed any additional briefs or affidavits for the courts consideration within the extension of time granted previously by the court.

After considering the Response filed by the Petitioner, the court on April 22, 2013 then appointed counsel for the petitioner for the limited purpose of filing a "further or additional response, supported by admissible evidence on the issue of timeliness and legal argument as to

why [the] Second Successive Petition for Post-Conviction Relief should not be dismissed based on the doctrine of res judicata or the doctrine of 'law of the case'."

On July 3, 2013 the Petitioner's appointed counsel filed his Reply to Notice of Intent to Dismiss, together with the Affidavits of Robert Johnson; Robert Richard Jones; and Erik R. Lehtinen.

I.

FACTUAL AND PROCEDURAL BACKGROUND

The court hereby incorporates the procedural and factual background as set forth in the Court's Notice of Intent to Dismiss. To summarize the history of this case, the petitioner on June 24, 1994 pled guilty to two counts of felony murder and was sentenced to fixed life on September 21, 1994.

On November 30, 1995 the petitioner filed a petition for post-conviction relief which was summarily dismissed on June 13, 1996. The summary dismissal was affirmed on July 10, 1997. *Robert Terry Johnson v. State of Idaho*, 1997 Unpublished Opinion No. 617.

On July 29, 2009 the petitioner filed a Successive Petition for Post-Conviction Relief based on an alleged *Brady*¹ violation. On January 15, 2010 the court dismissed the successive petition on its merits and on the basis that the successive petition was untimely filed. The petitioner appealed the dismissal of his successive petition. The Court of Appeals affirmed the dismissal on the basis that the petition was not timely filed. The Court of Appeals did not address the merits of the successive petition based on the *Brady* violation. *Robert Terry Johnson v. State of Idaho*, 2011 Unpublished Opinion No. 574 (August 8, 2011).

¹ *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963)

After issuance of the opinion of the Court of Appeals, the petitioner sought and was granted review by the Idaho Supreme Court, however, the court dismissed the petition for review on January 16, 2013 and the Remittitur was issued on January 16, 2013.

On February 14, 2013 the petitioner filed a second Successive Petition for Post-Conviction Relief. This successive petition again raises the same *Brady* violation that was asserted in his 2009 successive petition for post-conviction relief. In addition the petitioner asserts that his 2009 post-conviction counsel was ineffective in failing to conduct or properly perform discovery and in failing to properly argue and present evidence, including obtaining affidavits as to the issue of timeliness of his petition. He also asserts that the court should have conducted hearings on motions that he had filed in his 2009 action and that the State Appellate Public Defender failed to properly present on appeal his issue of timeliness of his 2009 successive petition for post-conviction relief.

II.

JUDICIAL NOTICE

The Court in its Notice of Intent to Dismiss pursuant to I.R.E. 201 took judicial notice of the following:

1. Unpublished Opinion No. 617, *Robert Terry Johnson v. State of Idaho*, dated July 10, 1997;
2. Memorandum Decision and Order Re: Motion for Summary Dismissal, entered January 15, 2010, *Robert Terry Johnson v. State of Idaho*, Gooding County Case No. CV-2009-399;
3. Unpublished Opinion No. 574, *Robert Terry Johnson v. State of Idaho* (Docket No. 37378), dated August 8, 2011;

4. Remittitur, (Docket No. 37378), issued January 16, 2013;
5. Registrar of Actions (ROA) in CV-2009-399.

In addition to the above, for purposes of this decision, the court hereby takes judicial notice of the practices, policies and procedures of the Idaho Department of Corrections as concerns and inmates "access to courts" as set forth in:

- a. Board of Correction IDAPA Rule Number 405, Policy Control No. 405.02.01.001, adopted 8-15-1995, attached hereto as Appendix "F".

III.

SUCCESSIVE POST-CONVICTION STANDARD

A petition for post-conviction relief is a civil proceeding, entirely distinct from the underlying criminal action. *Ferrier v. State*, 135 Idaho 797, 25 P.3d 110 (2001). If the petition fails to present or be accompanied by admissible evidence supporting its allegations, and making a prima facie case, i.e. establishing each essential element of the claim, then summary dismissal is appropriate. *Hernandez v. State*, 133 Idaho 794, 992 P.2d 789 (1999); *Martinez v. State*, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995). While the Court is required to accept petitioner's un rebutted allegations, it need not accept petitioner's bare or conclusory allegations. *Berg v. State*, 131 Idaho 517, 960 P.2d 738 (1998); *King v. State*, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

When presenting a successive petition for post-conviction relief, it is the burden of the petitioner to establish sufficient reason as to why the ground for relief was not asserted in her original petition; or was inadequately asserted in her original petition or that any waiver of an asserted claim was not knowingly, voluntarily and intelligently waived. I.C. § 19-4908. Therefore the court should not consider the grounds set forth in a successive petition until the petitioner has

established a "sufficient reason" as to why it was not raised or was inadequately raised in the original petition.

The Idaho Court of Appeals in *Baker v. State*, 142 Idaho 411, 420 128 P.3d 948, 957 (Ct. App. 2005) summarized the standard relative to a successive petition for post-conviction relief as follows:

The Uniform Post-Conviction Procedure Act (UPCPA) is designed to deal with collateral attacks upon allegedly improper convictions and sentences, not collateral attacks upon other post-conviction proceedings. *Wolfe v. State*, 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct.App.1987). Ineffective assistance of counsel in post-conviction proceedings is not among the permissible grounds for filing another post-conviction relief application. *Id.* All grounds for relief available to an applicant under the UPCPA must be raised in an applicant's original, supplemental, or amended application. I.C. § 19-4908. The language of Section 19-4908 prohibits successive applications in those cases where the applicant "knowingly, voluntarily and intelligently" waived the grounds for relief sought in the successive application or offers no "sufficient reason" for omitting those grounds in the original application. *See Palmer v. Dermitt*, 102 Idaho 591, 593, 635 P.2d 955, 957 (1981). However, Section 19-4908 allows an applicant to raise a ground for relief, which was addressed in a former application, if he or she can demonstrate sufficient reason why that ground was inadequately raised or presented in the initial post-conviction action. *See Hernandez v. State*, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct.App.1999). An allegation that a claim was not adequately presented in the first post-conviction action due to the ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief. *Hernandez*, 133 Idaho at 798, 992 P.2d at 793.

Therefore it is the burden of the petitioner on a successive petition for post-conviction relief to show that one of two things: (1) that her appointed counsel waived claims for relief sought which were asserted in the original petition and the waiver was not a "knowing, voluntary

and intelligent” waiver by the petitioner; or (2) the applicant must offer a “sufficient reason” for not having asserted or for having omitted grounds for relief in her original petition.

“The statutory scheme of the Uniform Post-Conviction Procedure Act is designed to deal with challenges to allegedly improper convictions and sentences, not collateral attacks upon other post-conviction proceedings.” *Nguyen v. State*, 126 Idaho 494, 498, 887 P.2d 39, 43 (Ct. App. 1994).

IV.

ISSUE FOR THE COURT’S DETERMINATION

As set forth above the issue for determination is whether the unpublished opinion of the court of appeals affirming the dismissal of the 2009 successive post-conviction petition on the basis of timeliness is a bar to this second successive petition for post-conviction relief on the basis of res judicata or the doctrine of law of the case.

V.

ANALYSIS

The petitioner in 2009 filed a successive petition for post-conviction relief on the basis that he had new evidence of a *Brady* violation based on an affidavit of his co-defendant Thomas Peterson. This court dismissed the successive petition based on its merits as well as on the basis of timeliness. This court determined that the successive petition filed in 2009 was not filed within a reasonable time. *Charboneau v. State*, 144 Idaho 900, 174 P.3d 870 (2007). The determination of this court as to the issue of timeliness was affirmed on appeal. (*Robert Terry Johnson v. State*, Unpublished Opinion No. 574, *Robert Terry Johnson v. State of Idaho*, dated August 8, 2011).

The petitioner has filed a Second Successive Petition, which seeks post-conviction relief on the same claim of a *Brady* violation as alleged in his 2009 Petition. As noted above, section 19-4908 “allows an applicant to raise a ground for relief, which was addressed in a former application, if he or she can demonstrate sufficient reason why that ground was inadequately raised or presented in the initial post-conviction action.” *Baker v. State, supra*. It would appear that the petitioner claims that his 2009 post-conviction relief counsel failed to adequately present facts as to the issue of timeliness of his 2009 Petition, and that if such facts had been presented his 2009 Petition would not have been dismissed as untimely. This court has not found nor has counsel for the petitioner identified any case in this State that has addressed the issue of counsel’s failure to adequately argue or support a claim that petition for post-conviction was filed timely as a basis for a successive petition for post- conviction relief. Clearly if the petitioner’s prior post-conviction failed to provide facts or other admissible evidence disclosed by the petitioner to such counsel relevant to the issue of timeliness, and if such “facts” would have established that petitioner filed his petition within a reasonable time, then the failure to provide such evidence or facts may constitute a “sufficient reason” for this second successive petition for post-conviction relief. On the other hand if the petitioner fails to establish such facts in this second successive petition as to the issue of timeliness, then this successive petition would be barred by either res judicata or the law of the case.

This court in its Notice of Intent to Dismiss has already addressed the facts presented in support of this second successive petition and why he has failed to establish a “sufficient reason” for this successive petition for post-conviction relief. The petitioner does not allege or claim a sufficient reason based on prior counsel’s failure to argue an extension of *Pizzuto v. State*, 146 Idaho 720, 202 P.3d 642 (2008) to a non-capital case. The petitioner claims that there were facts

he disclosed to prior counsel that were not provided to the court. Those facts are alleged to be contained in the Supplemental Affidavit of Robert Johnson and the Affidavit of Robert Richard Jones, filed with this court on July 3, 2013. These affidavits can be summarized in relevant part as follows:

- (1) According to Robert Richard Jones he has been an Idaho Department of Corrections (IDOC) inmate since June 24, 1991. That between 1991 to 1998 he served as an Inmate Law Clerk (ILC) at the Idaho Maximum Security Institution and /or Idaho State Correctional Institute. That as an ICL he would meet with an inmate on matters including post-conviction relief and would decide if they could assist an inmate and if he could, he would either provide advice to the inmate or he would draft the required legal documents for the inmate. He states that sometime in the late 1990's IDOC was no longer employing ILC's.
- (2) According to Robert Johnson, when he filed his 1995 petition for post-conviction relief he relied on an ILC to prepare and file the petition. After he received the written notarized confession from Thomas Peterson, he "did not know what to do with [the] new information" and he "knew ...that ICC no longer employed Inmate Law Clerks" and that "as soon as I could, I contacted the paralegal at the Idaho Correctional Center (ICC) and inquired how to proceed with the new information...". The paralegal informed him that he could not provide "advice on what to do." Prior to speaking to the paralegal², he contacted his aunt Karen Devine, "as soon as I could", and asked her for help to find an attorney. His aunt provided him with the addresses for some attorney and he wrote letters to the attorney's "as soon as I was able". Dennis Benjamin was the only attorney to reply to his letters and he spoke to Mr. Benjamin by telephone "as soon as I was able". Mr. Benjamin told him he needed to file another petition for post-conviction relief. "At my next available time, I visited the paralegal... and requested a packet of documents for post-conviction petitions." Further, "[I] took some time for me to request the packet, receive the packet, fill out the information needed in the packet, request an appointment to make copies of the

² "As I was waiting to speak with the paralegal ...I contacted my aunt, Karen Devine, as soon as I could...."
(Affidavit, ¶16)

packet, request an appointment in ICC for notary services, and to mail out the completed packet.” Lastly the “process still took weeks to complete” because he did not have an ILC to assist him, a lack of resources and the “constraints of my actions in ICC.”

The affidavits submitted in response to the court’s notice of intent to dismiss and filed in support of this successive petition must be considered in regards to an inmate’s right of access to the courts. The U.S. Supreme Court has held that states are not required to provide legal assistants or law clerks to prisoners to ensure meaningful access to courts. *See Lewis v. Casey*, 518 U.S. 343, 351, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (concluding that there is no “freestanding right to a law library or legal assistance”). Although a state must provide its prisoners with the necessary tools to access the courts, this access does not mean the inmate must be provided with legal advice, a complete law library or assistance with research and brief writing. *Lewis v. Casey*, 518 U.S. at 354.

The mere fact that IDOC stopped employing Inmate Law Clerks in the late 1990’s is not relevant to the issue of timeliness. There can be not dispute that IDOC did and does provide a “legal resource center” and paralegals to assist an inmate to access the courts to the extent permitted by law.³ In fact the “petition for post-conviction relief” as filed in 1995, 2009 and 2013 was a packet or form provided to the inmate by IDOC. Assuming that the petitioner relied on an ILC to prepare his petition for post-conviction relief in 1995, the fact remains that the petitioner had to assist and provide the information to the ICL to be included in the 1995 petition. The petitioner knew from prior experience that the avenue or procedure to challenge a judgment of conviction was a petition for post-conviction relief, whether or not he prepared the petition in 1995, he knew or should have known that could or might be an avenue or procedure for relief.

³ See, Appendix “F”

In the late 1990's IDOC replaced law libraries with "legal resource centers" and ILC's with paralegals. The legal resource centers consist of books containing relevant statutes and rules of procedure, including the Idaho State Code and United States Code Annotated, in addition to a set of forms and self-help packets for inmates to fill out and submit to the courts, including Petitions for Post-Conviction Relief. Further, whether the assistance of an ILC or paralegal was provided by IDOC, that person was never legally authorized to provide "legal advice" and it would have been unlawful to provide legal advice. (Board of Correction IDAPA Rule Number 405, Policy Control No. 405.02.01.001, adopted 8-15-1995, attached hereto as Appendix "F")⁴. An inmate is entitled to use the assistance of a paralegal and the legal resource center for post-conviction relief claims. IDOC has "Access to Courts Request Forms" that an inmate can complete and submit to obtain the necessary post-conviction relief forms, copies, notarization and mailing. (See, Appendix "F"). A paralegal may not engage in any activity that might be considered as engaging in the unauthorized practice of law.

The petitioner sometime prior to March 10, 2009, which he previously has said was "early 2009", received information from Mr. Peterson that petitioner was alleged to be a victim and not a perpetrator of the crimes he pled guilty to. The petitioner appears to have done nothing towards preparing a post-conviction relief petition, after receipt of information in "early 2009" and prior to receipt of the Peterson affidavit.

On March 10, 2009 the petitioner received the Peterson affidavit.⁵ Mr. Johnson alleges he "...did not know what to do with this information or the legal procedure to use the new information." (Johnson Supplemental Affidavit, ¶ 13.). The petitioner new or should have known

⁴ The court hereby takes judicial notice of the findings of fact relative to IDOC inmate access to courts as found in *Meza-Sayas v. Conway*, 2007 WL 2601086 (D. Idaho), September 10, 2007; *Bleau v. Beauclair*, 2007 WL 2344926 (D. Idaho), August 14, 2007.

⁵ Mr. Johnson in his most recent affidavit states "Sometime in 2009, Thomas Peterson, ... handed me a notarized confession...". Mr. Johnson is not specific as to the date he received the confession and yet this information should be known to him.

that he could use post-conviction relief as a means to challenge his conviction based on new evidence. The ignorance of a person of his or her right to bring an action does not excuse the petitioner from filing a successive petition within a reasonable period of time from discovery of the alleged *Brady* violation. *Reyes v. State*, 128 Idaho 413, 415, 913 P.2d 1183, 1185 (Ct. App. 1996). However, the petitioner was not totally ignorant by his own admission as pointed out in this court's notice of intent to dismiss:

The petitioner also attached an Affidavit from his aunt, Karen Devine. According to Ms. Devine, the petitioner wrote to her on March 11, 2009 asking for her help to find an attorney to assist him and she attached the petitioner's letter which in part states, **"...I have time limits on filing so I need help quickly. ..."**. Ms. Devine received this letter near the "end of March". Ms. Devine made contact with the Idaho State Bar in the middle of April, 2009 in an attempt to contact a lawyer for the petitioner. Ms. Devine believes that the petitioner was in contact with an attorney Mr. Benjamin in May, 2009." (Notice of Intent to Dismiss, pg. 11-12, emphasis added).

The petitioner states that "as soon as [he] could [he] contacted the paralegal...". (Johnson Supplemental Affidavit, ¶ 14.). This statement is nothing more than a general or conclusory allegation. Since his contact with a paralegal requires a written request form, the date that he requested paralegal assistance is readily available to the petitioner. The petitioner could have requested a post-conviction relief packet and he apparently did not. Instead, the petitioner wrote a letter to his aunt on March 11, 2009 hoping to get the assistance of an attorney, yet he had to know that he could not pay for the advice of an attorney. The petitioner has provided no admissible evidence or facts as to what he did between March 11, 2009 to May, 2009 to request, prepare or file a petition for post-conviction relief, although, as he stated to his aunt, he knew there were time limits which would suggest that he had obtained some information or knowledge from the legal resource center or from his prior post-conviction experience.

The petitioner alleges that sometime in May 2009 he spoke to an attorney, Mr. Benjamin and was advised to file a petition for post-conviction relief. (Johnson Supplemental Affidavit, ¶ 19.). The petitioner again is not specific as to when he requested a post-conviction relief packet from the legal resource center, other than to state, “at my next available time” or how long it took him to prepare it, other than to state “it took some time”. (Johnson Supplemental Affidavit, ¶ 20, 21.). Again the petitioner is not factually specific as to dates, while this information is readily available to the petitioner. Such statements are as before nothing more than general allegations or conclusions. It is apparent that the petitioner had not allegedly provided prior appointed counsel “specific facts or admissible evidence” as to what he did or attempted to do to file a timely successive petition. It would appear that he only provided “conclusory or general allegations”. Bare or conclusory allegations, unsubstantiated by any fact, are inadequate to entitle a petitioner to an evidentiary hearing. *Zikovic v. State*, 150 Idaho 783, 786, 251 P.3d 611, 614 (Ct. App. 2011). *See also Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

“To justify a post-conviction evidentiary hearing, the petitioner must make a factual showing based on admissible evidence.” *McKinney v. State*, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999). The application must be supported by written statements from competent witnesses or other verifiable information. *Paradis v. State*, 110 Idaho 534, 536, 716 P.2d 1306, 1308 (1986) (citing *Drapeau v. State*, 103 Idaho 612, 617, 651 P.2d 546, 551 (Ct.App.1982)). Unsubstantiated and conclusory allegations are insufficient to entitle a petitioner to an evidentiary hearing. *King v. State*, 114 Idaho 442, 446, 757 P.2d 705, 709 (Ct.App.1988).

Pizzuto v. State, 145 Idaho 155, 160, 233 P.3d 86, 91 (2010)

The petitioner could have obtained an affidavit from the paralegal he had spoken to, or the IDOC records from the legal resource center, including but not limited to copies of his access to courts request forms he submitted, which he has failed to do. In fact the petitioner does not

ever attest to the fact that he ever submitted any "Access to Court Request Forms". The petitioner has had since January 15, 2010 to obtain additional information and facts from IDOC to establish the timeliness of his successive petitions for post-conviction relief and yet as of this date and with the assistance of counsel has failed to do so.

The petitioner has previously admitted that he knew "in early 2009" of the alleged exculpatory evidence concerning Peterson. (Johnson Affidavit, dated December 3, 2009, ¶ 6.). The petitioner received the written confession from Peterson on or about March 10, 2009 and on March 11, 2009 he wrote a letter to his aunt to ask that she assist him in finding a lawyer. (Affidavit of Karen L. Devine, dated May 3, 2011). It is not reasonable for the petitioner to believe he could hire an attorney on his own and yet he knew or should have known that he could have requested appointment of counsel at the time of filing a post-conviction relief petition, from his prior experience. The petitioner had prior knowledge of post-conviction relief proceedings. The petitioner on or before March 11, 2009 the petitioner knew there were time limits for filing a petition for post-conviction relief. The petitioner prior to May, 2009 claims to have had contact with an IDOC paralegal, yet he never requested a post-conviction relief packet and forms from the "legal resource center". In May 2009 the petitioner spoke to an attorney, Dennis Benjamin, who told petitioner that he needed to file a petition for post-conviction relief, which he knew or should have known in March 2009. The petitioner has not identified the date or the month that he requested a post-conviction relief packet from the "legal resource center". The petitioner has not identified the date or month that he received the post-conviction relief packet or how long it took him to complete the petition for filing. The 2009 successive petition was mailed to the district court for filing on July 27, 2009 and was filed on July 29, 2009.

This court previously determined that four (4) months to file a successive petition for post-conviction relief was unreasonable under the circumstances and therefore untimely. This determination was affirmed on appeal. (Unpublished Opinion No. 574, *Robert Terry Johnson v. State of Idaho*, dated August 8, 2011)⁶. The petitioner has failed to establish a factually “sufficient reason” on the part of his prior appointed post-conviction relief counsel, as to justify this second successive petition. Further, the conduct of appellate counsel on post-conviction appeals is not grounds for relief. *Nguyen v. State*, 126 Idaho 494, 497-498, 887 P.2d 39, 42-43 (Ct. App. 1994). Further, even if appellate counsel had properly raised on appeal the extension of *Pizutto*⁷ for purposes of the petition for review, it is pure speculation that the Idaho Supreme Court would have extended the reasoning in *Pizutto* to noncapital cases. However, in *Pizutto*, the court held that in a capital case forty-two (42) days from the date the petitioner knew or should have known of the claim, is a reasonable time to file a successive petition for post-conviction relief and that beyond that time the petitioner would have to show “extraordinary circumstances that prevented [him] from filing the claim” within the forty-two day period. *Also see, Dunlap v. State*, 131 Idaho 576, 961 P.2d 1179 (1998). The decision in *Pizzuto* was decided a little over a year before the petitioner herein discovered the alleged *Brady* violation. If forty-two days is a reasonable time to file a successive petition in a capital case there is no reason to believe that such a time period would not be reasonable in a non-capital case. In fact, the petitioner herein was able to file this second successive petition within twenty-nine (29) days of the issuance of the Remittitur by the Supreme Court as to his 2009 successive petition.

The petitioner’s 2009 successive petition was adjudged by this court to be untimely in that it was not filed within a reasonable time after discovery of the confession of his co-

⁶ The Court of Appeals declined to extend the *Pizzuto* decision to noncapital cases.

⁷ *Pizzuto v. State*, 146 Idaho 720, 202 P.3d 642 (2008)

defendant and the decision of this court was affirmed on appeal. Under the “law of the case doctrine” our courts will not revisit issues that have previously been decided by an appellate court. *Stuart v. State*, 136 Idaho 490, 495, 36 P.3d 1278, 1283 (2001); *State v. Creech*, 132 Idaho 1, 9, 966 P.2d 1, 9 (1998). Further, in post-conviction proceedings, our courts have “applied the related principles of res judicata to bar an attempt to raise, in an application for post-conviction relief, the same issue previously decided in a direct appeal.” *Schultz v. State*, 153 Idaho 791, 798, 291 P.3d 474, 481 (Ct. App. 2012). The second successive petition for post-conviction relief is barred by the doctrines of res judicata and the “law of the case”. The petitioner’s successive petition for post-conviction relief based on an alleged *Brady* violation was untimely asserted in his 2009 successive petition and remains untimely to this date.

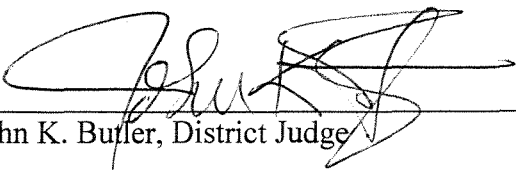
VI.

CONCLUSION AND ORDER

For the reasons set forth above and as set forth in the Court’s Notice of Intent to Dismiss, the petitioner’s second successive petition for post-conviction relief is hereby dismissed with prejudice.

IT IS SO ORDERED.

DATED this 31 day of July, 2013



John K. Butler, District Judge

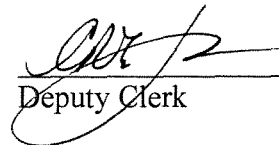
CERTIFICATE OF MAILING/DELIVERY

I, undersigned, hereby certify that on the 31 day of July, 2013 a true and correct copy of the foregoing MEMORANDUM DECISION RE: NOTICE OF INTENT TO DISMISS was mailed, postage paid, and/or hand-delivered to the following persons:


Robert Terry Johnson
IDOC # 27073
ICC- I 219 B
P.O. Box 70010
Boise, Idaho 83707

Gooding County Prosecutor
P.O. Box 86
Gooding, Idaho 83330

Steven R. McRae
McRae Law Office, PLLC
161 5th Ave. South, Ste. 100
P.O. Box 1233
Twin Falls, Idaho 83303


Deputy Clerk

APPENDIX "F"

Idaho Department of Correction 	Standard Operating Procedure Dual Divisions Operational Services	Control Number: 405.02.01.001	Version: 4.0	Page Number: 1 of 17
		Title: Access to Courts		Adopted: 8-15-1995 Reviewed: 11-2-2012 Next Review: 11-2-2014

This document was approved by Kevin Kempf, chief of the Division of Prisons, and Shane Evans, chief of the Division of Education, Treatment, and Reentry, on 11/2/12 (signature on file).

Open to the general public: ☒ Yes ☐ No

If no, is there a redacted version available: ☐ Yes ☐ No

BOARD OF CORRECTION IDAPA RULE NUMBER 405

Court Proceedings within a Facility

POLICY CONTROL NUMBER 405

Access to Courts

DEFINITIONS

Standardized Terms and Definitions List

Access to Courts Request Form: A printed form provided for offenders to make requests for accessing Idaho Department of Correction (IDOC)-provided legal resources or assistance from IDOC paralegal staff.

Access to Courts Manual: An Idaho Department of Correction (IDOC) manual that contains qualified legal claim packets and forms for offenders to file initial pleadings with a court.

Legal Mail: Confidential communication directly between (a) an offender and an attorney (for the purposes of seeking or providing legal services only), (b) an offender and the court, (c) opposing parties for service of documents (pursuant to court rules), or (d) third parties for service of documents (pursuant to court rules).

Legal Resources: Those statutes, codes, court rules, legal reference materials, and publications provided by the Idaho Department of Correction (IDOC) for use by offenders on legal matters.

Paralegal: A person hired by the Idaho Department of Correction (IDOC) to assist offenders with (a) completing legal packets and forms, and (b) accessing IDOC-provided legal resources, notary services, and translator services.

Resource Center: An area of a facility — designated and approved by the facility head — where (a) legal resources are maintained, and (b) the photocopying and mailing of legal materials are performed pursuant to written Idaho Department of Correction (IDOC) or facility guidelines.

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Unauthorized Practice of Law: The practicing of law by any person (a) who has not become duly admitted and licensed to practice law within the state of Idaho; (b) whose right or license to practice within the state of Idaho has been terminated either by disbarment, suspension, or failure to pay license; or (c) who practices or assumes to act or hold himself out to any other person as a person qualified to practice law, to include giving legal advice and counsel, and the preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court.

PURPOSE

The purpose of this standard operating procedure (SOP) is to establish guidelines for providing all offenders access to the courts so that they may pursue constitutionally mandated legal actions **and** other legal filings identified by the Idaho Department of Correction (IDOC).

SCOPE

This SOP applies to all offenders, **and** to all employees involved in the planning, management, or operation of any activity which governs the legal activities of offenders.

Note: This SOP shall also only apply to correctional facilities (prisons) and community work centers (CWCs). Hereinafter, correctional facilities (prisons) and CWCs shall be referred to as 'facilities'.

RESPONSIBILITY

Facility heads (or their designee) are responsible for (a) the implementation of this SOP, and (b) ensuring the guidelines **and** procedures provided herein are adhered to.

In carrying out their responsibilities, facility heads (or their designee) will:

- Make readily available to offenders locked boxes designated for access to courts request forms.
- Make access to courts request forms readily available to the offender population.
- Designate a location (generally the Resource Center) where all legal resource material will be kept.

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GENERAL REQUIREMENTS

1. Qualified Legal Claims

The IDOC has identified the following legal claims **and** legal claim packets in which paralegal staff will assist offenders.

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Note: If an offender is in need of assistance other than what is identified as qualified legal claims as set forth in this SOP, then the request for assistance should be sent via an Offender Concern Form (see SOP 316.02.01.001, *Grievance and Informal Resolution Procedures for Offenders*) to the Division of Prison's access to courts coordinator for consideration.

State Court

The Access to Courts Manual contains the following legal claim packets that are appropriate for filing in state court:

- Rule 35. (Correction or reduction of sentence)
- UPCPA. (Uniform Post-conviction Procedure Act)
- State civil rights.
- State habeas corpus.
- General appeals.
- UPCPA appeals.
- Rule 35 appeals.
- Probation revocation appeals.
- Modification of Idaho child support order.
- Medical malpractice.
- Tort claim.
- Credit for time served.
- Power of attorney.
- Miscellaneous forms.

Federal Court

The Access to Courts Manual contains the following legal claim packets that are appropriate for filing in federal court:

- Federal civil rights.
- Federal habeas corpus.
- 9th Circuit appeal appeals.
- Writ of Certiorari appeals.

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2. Process to Request Access to Courts Assistance, Services, and Resources

Access to Courts Request Process

Functional Roles and Responsibilities	Step	Tasks
Offender	1	<ul style="list-style-type: none"> Request paralegal assistance, services, and resources using the applicable Access to Courts Request Form; and Place the signed form in the designated lock box. <p>Note: If in need of the form, see a paralegal (or other facility head-designated staff member per <u>section 15</u> of this SOP). The form comes in English and Spanish.</p>
Paralegal Staff	2	Gather the access to courts request forms each business day.
Paralegal Staff	3	Send the requested resources (e.g., a form or qualified legal claim packet) to the offender using institutional mail (see SOP 402.02.01.001, <i>Mail Handling in Correctional Facilities</i>), or schedule a visit with the offender at the Resource Center or other location.
Paralegal Staff	4	<p>If requested, provide the offender with the list of qualified legal claim packets (see <u>section 1</u>) from which to choose.</p> <p>Note: If offender is illiterate see step 8.</p>
Paralegal Staff	5	Allow the offender to review legal resources at the Resource Center or check out legal resources for a designated period.
Paralegal Staff	6	If books are checked out, log in the Daily Book Check-out Log (located in the Access to Courts database).
Paralegal Staff	7	<p>If the offender requests assistance, help the offender complete authorized court filings.</p> <p>Note: If the offender has a physical disability, is unable to prepare or write the materials or documents, and requires assistance, see <u>section 8</u> of this SOP.</p>
Paralegal Staff	8	<p>If the offender is illiterate in the English language:</p> <ul style="list-style-type: none"> Arrange for an IDOC staff member, who speaks the offender's native language, to interpret; or Arrange for another offender, who speaks the offender's native language, to interpret; or Access the Language Line Services to provide interpretation.
Offender	9	<p>Complete the claim for filing with the court.</p> <p>Note: To complete this process, also see <u>section 4</u> of this SOP.</p>

3. Authorized Photocopies

Authorized photocopies include:

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- Documents and all attachments allowed pursuant to this SOP that are ready to be filed with the court **and** opposing counsel, as required.
- A completed Power of Attorney signed by the offender **and** notarized, if needed.

Note: If there is a question regarding the documents or attachments, paralegal staff will determine what documents are necessary based on court rules or by contacting the court.

Class Action and Multiple Offender Legal Actions

When offenders jointly file documents and attachments with the court as co-plaintiffs (parties to the legal action) photocopies shall not be made for all parties to the legal action because a full photocopy must be maintained in the Resource Center. However, the offender who filed the legal action with the court will have the option of paying for one additional full photocopy, which must be maintained as his personal copy. Upon request, all other parties to the legal action will be allowed to review the photocopy maintained in the Resource Center.

Photocopies of subsequent filings regarding the legal action shall be placed with the previous photocopy maintained in the Resource Center so that a full and complete record of the legal action is available.

If an offender who is a party to the legal action is transferred to another facility, then a full photocopy of the initial filing and subsequent filings can be made for that offender at his own expense. However, if the offender meets the requirements to be considered indigent as defined in SOP 402.02.01.001, *Mail Handling in Correctional Facilities*, a full photocopy can be made for that offender upon his request at no expense to the offender.

4. Mailing and Photocopying Court Documents and Legal Mail

Photocopying privileges for offenders include the following conditions:

- Offenders (excluding indigent offenders) will be charged a fee of ten cents (\$.10) per page for copies.
- Offenders (excluding indigent offenders) should use their own envelopes for court filings; however, by necessity to meet a court filing deadline, if envelopes are obtained through the Resource Center, offenders (excluding indigent offenders) will be charged the equivalent commissary price.
- Page limitations on pleadings may be enforced in accordance with court rules.

Note: Mail sent to the Idaho Judicial Council, Idaho State Bar, **or** courts is not (by definition) legal mail and is therefore subject to search. However, paralegal staff shall still log mail sent to these entities on the Outgoing Legal Mail Log (located in the Access to Courts database).

Procedure for Filing Pleadings and Other Documents with a Court

Functional Roles and Responsibilities	Step	Tasks
Offender	1	Complete the documents, forms, or pleadings to be photocopied and mailed.

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Functional Roles and Responsibilities	Step	Tasks
Offender	2	Submit to the paralegal staff the applicable Access to Courts Request Form for copies, notary (if needed), and mailing services. Note: If in need of the form, see a paralegal (or other facility head-designated staff member per <u>section 15</u> of this SOP). The form comes in English and Spanish.
Paralegal Staff	3	<ul style="list-style-type: none"> Meet with the offender; and Determine those documents authorized for photocopying in accordance with this SOP.
Paralegal Staff	4	Notarize the documents that require a notary (if needed).
Paralegal Staff	5	Photocopy the documents as required by court rules.
Paralegal Staff	6	<p>Within two (2) business days of completing the request:</p> <ul style="list-style-type: none"> Complete an <u>Offender Personal Funds Withdrawal Slip</u>; and Forward it to the facility financial specialist (or designee) for processing. <p>Note: If the offender is indigent, you do not need to complete a withdrawal slip nor charge the offender for photocopying the documents.</p>
Paralegal Staff	7	Complete the Outgoing Legal Mail Log (located in the Access to Courts database) and if needed, the Notary Services Log.
Paralegal Staff	8	If necessary, forward the legal mail to the mailroom for postage and mailing.

5. Service of Documents Upon Opposing Parties

Note: Service of a Summons **and** Complaint via mail does not constitute effective service in a state of Idaho court matter.

Service on the IDOC, Idaho Board of Correction, Idaho Commission of Pardons and Parole, or Any Employee Thereof

An offender shall neither attempt, nor cause another offender acting on his behalf to attempt to personally serve the IDOC, the Idaho Board of Correction, the Idaho Commission of Pardons and Parole, or any employee thereof, with any legal documents.

Service on the IDOC, the Idaho Board of Correction, the Idaho Commission of Pardons and Parole, or any employee thereof, by an offender or member of the general public, shall be made by personal service upon a deputy attorneys general (DAG) who represents the IDOC. Service on any other person or entity shall be the sole responsibility of the offender.

Note: Any service upon a DAG must (a) be in accordance with applicable court rules and (b) take place at Central Office. (See *Idaho Rules of Civil Procedure [IRCP]*, rules 4 [d] 2 **and** 4 [d] 5; *Federal Rules of Civil Procedure*, rule 4; **and** Idaho Administrative Procedure Act [IDAPA] 06.01.01, section 106.)

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Service on an Offender

In General

When an offender is served with a summons and complaint that is not a qualified legal claim (as described in section 1) and which requires a response per *IRCP* or *Federal Rules of Civil Procedure*, the offender shall be provided the opportunity to file a response. Paralegal staff shall provide mailing and photocopying services (see section 4) that are consistent with court filing requirements.

Note: Paralegal assistance (see section 11) shall be limited to the initial response only.

By an Outside Process Server

Occasionally, an offender may be served with court documents regarding a civil action filed against the offender. Federal and state of Idaho court rules provide for service to be conducted by any outside process server who is 18 years of age or older and not a party to the case. The outside process server does not have to be law enforcement personnel or a professional process server.

If a victim to the offender's crime is on legal aid, the victim may make a request to the IDOC victim services coordinator to help coordinate service on the offender.

Note: Due to significant security concerns about letting an outside process server come into a facility to serve documents, each facility shall develop a field memorandum to describe service of process on offenders at that facility. The Division of Prison's access to courts coordinator should be contacted to provide guidance to facility staff in the development of the field memorandum.

6. Access to Court Supplies for Indigent Offenders

Indigent status is defined in SOP 402.02.01.001, *Mail Handling in Correctional Facilities*. If an offender does not meet the requirements as defined to be considered indigent, the paralegal (or other facility head-designated staff member per section 15) shall ensure the offender has the ability to access the courts in accordance with this SOP. This may include providing the offender with indigent supplies, photocopying documents for the offender, or providing postage, if necessary. For example, if an offender has one dollar and twenty cents (\$1.20) in his Offender Trust Account and needs to make 30 photocopies of a motion and mail it to the court to be filed, the paralegal (or other facility head-designated staff member per section 15) shall accommodate the request even though the offender does not have enough money in his account to cover the full expense of photocopying and mailing the motion.

Indigent supplies include the following:

- Blank paper for preparing court filings (no more than 25 sheets in an offender's possession at any time).

Note: Indigent offenders should use preprinted forms if available. The blank sheets of paper must have the facility name and the terms 'indigent legal paper' printed in the bottom left corner of at least one side of the paper to identify it as paper that has been authorized for legal work.

- Envelopes for mailing at the time of filing or to a verifiable attorney of record.
- One security pen (black ink only) on an exchange basis.

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Note: The sufficient amount of postage required to mail authorized legal documents for filing shall be affixed to the envelope (see SOP 402.02.01.001, *Mail Handling in Correctional Facilities*).

Procedure to Obtain Indigent Supplies

Functional Roles and Responsibilities	Step	Tasks
Offender	1	Request indigent supplies using the applicable Access to Courts Request Form.
		Note: If in need of the form, see a paralegal (or other facility head-designated staff member per <u>section 15</u> of this SOP). The form comes in English and Spanish.
Paralegal Staff	2	Determine what indigent supplies are needed.
Paralegal Staff	3	By individual items, enter the indigent supplies in the Resource Center Indigent Offender Supplies Log and Access to Courts database.
Paralegal Staff	4	Issue the indigent supplies to the offender.

Note: If the offender is misusing or wasting the indigent supplies issued to him, the facility head (or designee) may limit the number of indigent supplies the offender has on hand or is issued.

7. Offenders Who are Unable to Complete Forms

An offender who believes he needs help completing qualified legal claim forms may:

- In accordance with SOP 402.02.01.001, *Mail Handling in Correctional Facilities*, and directive 503.02.01.001, *Offender Telephone Monitoring and Recording*, directly contact an attorney and seek representation at the offender's expense; or
- Complete a Motion and Affidavit in Support for Appointment of Counsel; or
- Request assistance from paralegal staff (see section 2 and/or section 8).

8. Offender-to-Offender Assistance

Offenders may assist one another with legal work under the following guidelines:

- Both offenders must live in the same housing unit and have access to one another during normal facility operations.
- The assisting offender cannot (a) work on the legal material alone, (b) be in possession of the other offender's legal materials, or (c) prepare or write the other offender's materials and documents unless the offender is unable to prepare or write them due to being illiterate in the English language or due to a physical disability.
- An offender shall not receive any item or service for helping another offender with legal work.
- An offender shall not represent another person in any legal proceeding.

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WARNING!

Offenders must not engage in the unauthorized practice of law. (Idaho Code, section 3-420, and In Re: Matthews, 58 Idaho 772.) Offenders may be referred to the Idaho State Bar for prosecution for the unauthorized practice of law. Any offender caught engaging in the unauthorized practice of law will be prohibited from assisting any other offender.

Obtaining, Completing, and Processing Affidavits

When affidavits are complete, the affidavits **and** copies of attachments becomes the property of the offender filing the claim. (The attachments that have the original signature will be returned to the offender providing the affidavit.)

When necessary, due to custody level; housing; or facility, paralegal staff will help offenders with the process of obtaining affidavits. To eliminate questions regarding the affidavit process, the following information must be obtained before the process begins:

- The name **and** address of the offender filing the document;
- The court in which the case is pending or will be filed;
- The name of the offender attesting to the information in the affidavit; and
- The case number if one has been assigned.

After the information noted above is obtained, the affidavit can be given to the offender attesting to the information. The offender attesting to the information can write the affidavit **or** sign the document if the offender filing the document wrote the information. If the offender attesting to the affidavit is in another facility, the paralegal staff will facilitate the process.

9. Right to Retain Counsel

This SOP is not intended to interfere with an offender's right to retain counsel.

10. Supervision of Paralegal Staff

The facility head will designate a deputy warden to provide direct supervision of paralegal staff. Paralegal staff will address operational issues with the designated deputy warden. The paralegal **or** deputy warden may contact the Division of Prison's access to courts coordinator regarding operational issues.

The chief of the Division of Prisons (or designee) will designate a division access to courts coordinator.

The Division of Prison's access to courts coordinator will report directly to the chief of the Division of Prisons (or designee) **and** be responsible for the following:

- Responding to any request that is not authorized pursuant to this SOP (also see the note box in section 1);
- Scheduling **and** coordinating paralegal meetings;
- Identifying training needs **and** agenda items for the meeting;
- Facilitating the meeting;

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- Providing guidance to paralegal staff, facility staff, and IDOC administration regarding access to courts issues;
- Requesting clarification from the DAG's Office (who represents the IDOC) regarding access to courts issues;
- Requesting clarification of policy **and** SOP issues from the IDOC policy coordinator or Division of Prison's policy coordinator, as applicable (both coordinators are located at Central Office); and
- Maintaining **and** issuing the password to the password protected Access to Courts Manual only to those deemed as having a need to know, such as paralegals and attorneys.

11. Duties of Paralegal Staff

The IDOC shall employ paralegal staff to assist offenders with qualified legal claims. Paralegal duties include the following:

- Responding to any request described in this SOP.
- Providing offenders with IDOC-authorized legal resources.
- Providing offenders with qualified legal claims packets **and** appropriate instructions.
- Providing notary services to the offender population.
- Providing or securing translator services for non-English speaking **and** special needs offenders seeking assistance with initial pleadings for qualified legal claims.
- Maintaining the following logs and forms in the Resource Center:
 - ◆ Daily Book Check-out Log (Located in the Access to Courts database.)
 - ◆ Individual Activity Log (Located in the Access to Courts database.)
 - ◆ Notary Services Log (**Note:** Notary logs are the property of the notaries.)
 - ◆ Outgoing Legal Mail Log (Located in the Access to Courts database.)
 - ◆ Resource Center Attorney Telephone Call Request Form
 - ◆ Resource Center Copies Log
 - ◆ Resource Center Indigent Offender Supplies Log
 - ◆ Resource Center Request to Store Excess Legal Materials Form

A paralegal will **not**:

- Assist offenders to file any claim that is beyond the scope of this SOP.
- Offer legal advice. (**Note:** Assistance with grammar, spelling, or other matters not of a legal consequence shall not be considered offering legal advice.)
- Represent an offender.
- Refer offenders to attorneys or attorneys to offenders.
- Make unauthorized changes to Access to Courts Manual forms or packets.
- Schedule appointments for offenders to meet with each other.

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- Issue the password to the password protected Access to Courts Manual to any other persons.

12. Legal Resources

As described in table 15-1, Resource Centers will maintain the publications, forms, and packets listed in the Access to Courts Manual and make them available to the facilities they service.

Facility staff may not purchase additional items or create additional forms without the written approval of the director of IDOC (or designee).

Resources may be used in the Resource Center or checked out as approved by paralegal staff.

The IDOC does not provide for extensive or generalized legal research. If an offender wants additional research materials not available in the Resource Center, the materials may be received through the mail in accordance with SOP 402.02.01.001, *Mail Handling in Correctional Facilities*.

13. Telephone Hearings and Attorney Telephone Calls

Table 13-1: Telephone Hearings

Functional Roles and Responsibilities	Step	Tasks
Facility Head	1	Designate an area(s) that can be used for telephone hearings.
Offender	2	Provide to paralegal staff a photocopy of the court order or notice of hearing at least 24 hours prior to the telephone hearing.
Paralegal Staff	3	Review the court order or notice of hearing.
Paralegal Staff	4	Ensure the offender is scheduled or made available at the time of the telephone hearing.
Paralegal Staff (or Designee)	5	Facilitate the telephone hearing call at the appropriate time.
Paralegal Staff	6	Log the call using the Individual Activity Log (located in the Access to Courts database).
Offender	7	Participate in the telephone hearing.

Note: If the offender fails to provide 24 hour notice to the IDOC, a paralegal staff will still facilitate the call, if possible.

Table 13-2: Attorney Telephone Calls

Offenders can place unmonitored telephone calls to their attorneys using the offender telephone system (see directive 503.02.01.001, *Offender Telephone Monitoring and Recording*). If an offender is unable to place a direct telephone call to his attorney using the offender telephone system, the offender may then (a) contact the attorney via mail (in accordance with SOP 402.02.01.001, *Mail Handling in Correctional Facilities*) and request that the attorney place a telephone call to facility paralegal staff and ask them to

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arrange a telephone call from the offender to the attorney **or** (b) simply just correspond with the attorney via mail.

Occasionally an attorney may have difficulty making contact with an offender because of schedule conflicts or due to the offender's inability to access the telephone at a specific time. If an attorney or attorney's agent contacts the paralegal requesting to talk to an offender, **and** the paralegal determines the normal process outlined in directive 503.02.01.001, *Offender Telephone Monitoring and Recording*, will not work, the paralegal will use the following process steps:

Functional Roles and Responsibilities	Step	Tasks
Attorney (or Attorney's Agent)	1	<ul style="list-style-type: none"> Contact the paralegal staff; and Request an attorney telephone call with the offender.
Paralegal Staff	2	Log the request using the Individual Activity Log (located in the Access to Courts database).
Paralegal Staff	3	Prepare a Resource Center Attorney Telephone Call Request Form to forward to the offender with the name of the attorney, the telephone number to call, and the date and time the attorney telephone call is to be placed.
Offender	4	Place the attorney telephone call.

14. Forms for Qualified Legal Claims

Authorized forms for qualified legal claims are maintained in the Access to Courts Manual. Only paralegal staff and designees have access to the manual (see section 10 for further details). The Access to Courts Manual table of contents lists the authorized materials.

Prohibited Forms

Offenders must not draft **or** possess the following:

- Completed **or** blank transport orders; and
- Blank letterhead stationery (of any kind).

15. Access to Courts Procedures for Facilities without a Resource Center

Offenders housed at St. Anthony Work Camp (SAWC), North Idaho Correctional Institution (NICI), South Boise Women's Correctional Center (SBWCC), or a CWC will use the appropriate Resource Center listed in table 15-1 to provide offenders access to court services. The Division of Prison's access to courts coordinator may also be contacted to provide services. The facility head (**or** designee) will designate a facility staff member to help offenders with general, day-to-day operational issues regarding access to courts matters. The Division of Prison's access to courts coordinator can make temporary (up to 60 days) reassignments of this reporting structure to accommodate training or staff shortages. The assigned paralegal staff member at the facility that has a Resource Center shall visit (as needed, but at least once a month) the facility served that does not have a Resource Center (see the following table).

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Table 15-1: Resource Centers

Resource Center	Facility Served
Idaho Correctional Institution Orofino (ICIO)	<ul style="list-style-type: none"> • ICIO • NICI
South Idaho Correctional Institution (SICI)	<ul style="list-style-type: none"> • East Boise CWC • Nampa CWC • SBWCC • SICI • SICI CWC
Pocatello Women's Correctional Center (PWCC)	<ul style="list-style-type: none"> • Idaho Falls CWC • PWCC • SAWC

Table 15-2: Process Steps for Offenders Housed at Facilities without a Resource Center

Functional Roles and Responsibilities	Step	Tasks CIS steps are in bold
Offender	1	Complete the applicable Access to Courts Request Form, asking the facility head (or designee) for paralegal assistance, services, or resources. <i>Note: If in need of the form, see a paralegal (or other facility head-designated staff member per <u>section 15</u> of this SOP). The form comes in English and Spanish.</i>
Facility Head (or Designee)	2	Place a telephone call to the appropriate Resource Center <u>and</u> , if possible, have the offender talk directly to a paralegal.
Paralegal	3	<ul style="list-style-type: none"> • Tell the facility head (or designee) which services or resources the offender needs; and • Log the call using the Individual Activity Log (located in the Access to Courts database).
Facility Head (or Designee)	4	<ul style="list-style-type: none"> • Ensure the offender receives the services or resources; and • Document in the Corrections Integrated System (CIS), using the contact sheets, when the offender receives the services or resources.

For further assistance with CIS, see your designated CIS super user.

16. Storage of Excess Legal Materials

Each facility head will identify a secure area for storing an offender's excess legal materials.

The IDOC will store legal materials related to active and ongoing litigation that cannot be contained in an offender's authorized personal property. The amount of storage space needed will be taken into consideration when storing an offender's legal materials that are referenced in the offender's active and ongoing litigation.

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The IDOC will not store case law that is not specifically and directly related to an active and ongoing case, excess legal materials, multiple copies of pleadings, research materials, or materials not directly related to the offender's active and ongoing litigation.

Legal materials remaining after the offender has been released will be disposed of in accordance with SOP 320.02.01.001, *Property: State-issued and Offender Personal Property*. If the offender has paroled, any legal material he left at the facility shall be forwarded to the offender's new address **and documented in the Corrections Integrated System (CIS) in accordance with SOP 320.02.01.001**.

On an annual basis, paralegal staff (with the offender present) will review stored excess legal materials. If the offender cannot be present, paralegal staff will document the reason why using the Individual Activity Log (located in the Access to Courts database).

Note: Each facility shall develop a field memorandum to describe the process for offenders to store **and** retrieve their excess legal materials, **and** a process to inventory the material. The Division of Prison's access to courts coordinator should be contacted to provide guidance to facility staff in the development of the field memorandum.

Process Steps: Storage of Excess Legal Materials

For the purpose of this SOP only, 'secure storage' shall mean an area in a Resource Center **or** another part of the facility (a) that can be locked, and (b) where offenders **and** unauthorized staff do not have access.

Functional Roles and Responsibilities	Step	Tasks
Offender	1	<ul style="list-style-type: none"> Complete a Resource Center Request to Store Excess Legal Materials Form; and Submit it to housing unit staff for verification. <p>Note: If in need of the form, see a paralegal (or other facility head-designated staff member per <u>section 15</u> of this SOP).</p>
Housing Unit Staff	2	<ul style="list-style-type: none"> Verify that the legal materials are in excess of the allowable three (3) cubic feet of personal papers and legal materials allowable per SOP <u>320.02.01.001</u>, <i>Property: State-issued and Offender Personal Property</i>; and Complete the submitted Resource Center Request to Store Excess Legal Materials Form and return it to the offender.

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Functional Roles and Responsibilities	Step	Tasks
Offender	3	<p>Submit the completed Resource Center Request to Store Excess Legal Materials Form to paralegal staff (or other facility head-designated staff member per <u>section 15</u> of this SOP).</p> <p>Note: If there are no case numbers, titles, court information, or required signatures on the form, paralegal staff (or the facility head-designated staff member) will return the form to you and the process will end here.</p> <p>Note: If needed, the paralegal staff (or facility head-designated staff member) will provide you with a box to store your excess legal materials. However, if you want to organize your excess legal materials when storing them, it shall be your responsibility to purchase organizing materials (e.g., file folders and manila envelopes) from the commissary and organize your excess legal materials prior to storing them.</p>
Paralegal Staff (or Designee)	4	<p>Verify case numbers, titles, court information, and whether required signatures are provided.</p> <ul style="list-style-type: none"> • If this information is not submitted — return the form to the offender and end the process here until the required information is submitted; or • If this information is submitted — proceed to step 5.
Paralegal Staff (or Designee)	5	<p>Inform the offender when to bring the excess legal materials to the secure storage location.</p> <p>Note: If needed, provide the offender with a box to store his excess legal materials. If the offender wants to organize his excess legal materials before storing them, it shall be the offender's responsibility to purchase organizing materials (e.g., file folders and manila envelopes) from the commissary and organize his excess legal materials prior to being allowed to store them.</p>
Paralegal Staff (or Designee) and Offender	6	<p>In accordance with <u>section 20</u> of this SOP and SOP 320.02.01.001, <i>Property: State-issued and Offender Personal Property</i>:</p> <ul style="list-style-type: none"> • Search the excess legal material for unauthorized items; and • Dispose of the unauthorized items in accordance with SOP 320.02.01.001.
Paralegal Staff (or Designee) and Offender	7	<p>Clearly mark and identify each file folder or manila envelope with numbers and letters. (E.g., Box 2, File 3.)</p>
Paralegal Staff (or Designee)	8	<p>Create an inventory sheet for documenting and tracking the excess legal materials.</p>

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17. Record Retention

Paralegal staff will retain copies of access to court forms, attachments, and other logs and documentation identified in this SOP as follows: five (5) years for paper **and** seven (7) for electronic records.

18. Attorney Visits

Attorney visits are explained in SOP 604.02.01.001, *Visiting*.

19. Confidential Mail

All indigent confidential mail shall be processed in accordance with SOP 402.02.01.001, *Mail Handling in Correctional Facilities*.

20. Searching Legal Material

Information regarding the search of offenders' legal material can be found in SOP 317.02.01.001, *Searches: Cell/Living Unit, and Offender*.

REFERENCES

Directive 503.02.01.001, *Offender Telephone Monitoring and Recording*

Federal Rules of Civil Procedure, Rule 4, *Summons*

Idaho Code, Title 3, Chapter 4, Section 3-420, *Unlawful Practice of Law – Penalty*

Idaho Department of Correction Manual, *Access to Courts*

Idaho Rules of Civil Procedure (IRCP), Rule 4 (d) (2), *Service Upon Individuals*

Idaho Rules of Civil Procedure (IRCP), Rule 4 (d) (5), *Service Upon State, Agencies or Governmental Subdivisions*

IDAPA 06.01.01, *Rules of the Board of Correction*, Section 106, *Service of Process on Department Employees*

Language Line Services (www.language.com)

Offender Personal Funds Withdrawal Slip

Standard Operating Procedure 316.02.01.001, *Grievance and Informal Resolution Procedures for Offenders*

Standard Operating Procedure 317.02.01.001, *Searches: Cell/Living Unit, and Offender*

Standard Operating Procedure 320.02.01.001, *Property: State-issued and Offender Personal Property*

Standard Operating Procedure 402.02.01.001, *Mail Handling in Correctional Facilities*

Standard Operating Procedure 604.02.01.001, *Visiting*

State of Idaho, Idaho Judicial Council (www.judicialcouncil.idaho.gov)

State of Idaho, Idaho State Bar (www.isb.idaho.gov)

State v. Mathews, 58 Idaho 772, 79 P.2d 535, (1938)

United States Courts (www.uscourts.gov)

United States Department of the Treasury, Internal Revenue Service (IRS) (www.irs.gov)

– End of Document –

DISTRICT COURT
GOODING CO. IDAHO
FILED

2013 JUL 31 AM 9:45

GOODING COUNTY CLERK

BY: 

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF

STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

ROBERT JOHNSON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-2013-84

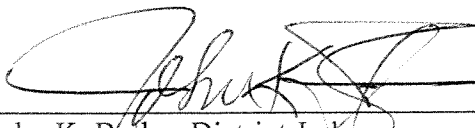
JUDGMENT OF DISMISSAL

The court having entered a Notice of Intent to Dismiss and after having received and considered the Petitioner's Response, the court entered its Memorandum Decision Re: Notice of Intent to Dismiss,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the Petitioner's Second Successive Petition for Post-Conviction Relief is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED this 31 day of July, 2013


John K. Butler, District Judge

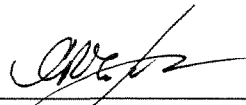
CERTIFICATE OF MAILING/DELIVERY

I, undersigned, hereby certify that on the 31 day of July, 2013 a true and correct copy of the foregoing JUDGMENT OF DISMISSAL was mailed, postage paid, and/or hand-delivered to the following persons:

Robert Terry Johnson
IDOC # 27073
ICC- I 219 B
P.O. Box 70010
Boise, Idaho 83707

Gooding County Prosecutor
P.O. Box 86
Gooding, Idaho 83330

Steven R. McRae
McRae Law Office, PLLC
161 5th Ave. South, Ste. 100
P.O. Box 1233
Twin Falls, Idaho 83303



Deputy Clerk

Steven R. McRae [ISB No. 7984]
 McRAE LAW OFFICE, PLLC
 P.O. Box 1233
 Twin Falls, ID 83303-1233
 Telephone No. (208) 944-0755
 Facsimile No. (208) 736-0041
 e-mail: SMcRae@MagicValleyLegal.com

Attorney for Petitioner

DISTRICT COURT
 GOODING CO. IDAHO
 FILED

2013 AUG 14 AM 11:16

GOODING COUNTY CLERK
 JULIE GOLD
 BY: _____ DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF
 IDAHO, IN AND FOR THE COUNTY OF GOODING

ROBERT JOHNSON,)	
	)	Case No. CV-2013-84
Petitioner,)	
	)	MOTION FOR RECONSIDERATION
vs.	)	AND REQUEST FOR OPPORTUNITY
	)	TO RESPOND I.R.C.P. 11(a)(2), I.C. §
STATE OF IDAHO,	)	19-4906(b)
)	
Respondent.)	
_____)	

COMES NOW, Petitioner, Robert Johnson, by and through his attorney of record, Steven R. McRae of McRae Law Office, PLLC, and files this *Motion for Reconsideration* pursuant to I.R.C.P. 11(a)(2) and Idaho Code § 19-4906(b). Specifically, Petitioner asks for twenty (20) days to respond to new factual assertions, analysis and legal conclusions as contained in the Court's *Memorandum Decision re: Notice of Intent to Dismiss* as filed on March 12, 2013 (the "*Memorandum Decision*") that were not contained in the *Notice of Intent to Dismiss* filed on July 31, 2013. Oral Argument is requested on this matter.

ARGUMENT

Pursuant to Idaho Code § 19-4906(b), a Court can, by its own volition, dismiss a post-conviction petition. However, in order to do so, the Court must grant the post-conviction petitioner "an opportunity to reply within 20 days to the proposed dismissal." *Id.*

In *Gibbs v. State*, 103 Idaho 758, 653 P.2d 813 (Ct. App. 1982), the Idaho Court of Appeals further considered the application of Idaho Code § 19-4906(b). In *Gibbs*, Gibbs filed a petition for post-conviction relief. *Id.* at 759, 653 P.2d at 814 (Ct. App. 1982). The State moved to dismiss the petition on the sole ground that it was not timely filed under Idaho Code § 19-4902. *Id.* The District Court granted the motion to dismiss; however, the Court based its decision not on the question for timeliness, but on the merits of Gibbs' application. *Id.* The Idaho Court of Appeals held that the dismissal by the District Court was inappropriate, as the petitioner was not given the requisite twenty (20) days' notice as required by Idaho Code § 19-4906(b). *Id.* at 760, 653 P.2d at 815 (Ct. App. 1982). The Court held, "For Gibbs to have had a chance to argue the point which determined the outcome of the case, it was necessary for the district court to comply with the notice requirement. *The obvious purpose of the notice requirement of I.C. § 19-4906(b) is to ensure that a petitioner will have the opportunity to challenge an adverse decision before it becomes final.*" *Id.* (Emphasis added).

In the present matter, Petitioner is asking for a twenty (20) day period so as to answer newly asserted factual allegations and legal grounds as contained in the *Memorandum Decision* to dismiss Petitioner's *Petition and Affidavit for 2nd Successive Post-Conviction Relief*. Specifically, Petitioner requests the opportunity to research and respond to the following:

- a. The Court states that petitioner's factual allegations are "bare and conclusory". See *Memorandum Decision* at 11-12. Petitioner seeks the opportunity to research respond to this

legal reasoning and conclusion, which was not contained in the Court's *Notice of Intent to Dismiss*.

b. The Court states, "The ignorance of a person of his or her right to bring an action does not excuse the petitioner from filing a successive petition within a reasonable period of time from discovery of the alleged *Brady* violation." *Memorandum Decision* at 11. Petitioner seeks the opportunity to research and respond to this legal conclusion, which was not contained in the Court's *Notice of Intent to Dismiss*.

c. The Court references IDAPA No. 405, Policy Control No. 405.02.01.001 and draws several inferences from the same. *See Memorandum Decision* at 9-13. Petitioner seeks the opportunity to research and respond to the inferences and conclusions as have been drawn by the Court from the IDAPA in arguing that he filed his original post-conviction petition within a "reasonable time", as the Court's inferences, analysis and conclusions were not contained in the Court's *Notice of Intent to Dismiss*.

d. The Court makes other inferences based upon the factual record (not based upon the above-cited IDAPA). *See Memorandum Decision* at 11 (that because Petitioner stated that he has time limits, that he must have "obtained some information or knowledge from the legal resource center or from his prior post-conviction experience") and (that Petitioner "had to know that he could not pay for the advice of an attorney"); and at 13 (that "[i]t is not reasonable for the petition to believe he could hire an attorney on his own ..."), (that "he knew or should have known that he could have requested appointment of counsel at the time of filing a post-conviction relief petition, [sic] from his prior experience."), (that "[t]he petitioner had prior knowledge of post-conviction relief proceedings."), and (that Petitioner knew there were time limits for filing a petition for post-conviction relief). Petitioner seeks the opportunity to research

and respond to the inferences and conclusions as have been drawn by the Court in arguing that he filed his original post-conviction petition within a "reasonable time", as the Court's inferences, analysis and conclusions were not contained in the Court's *Notice of Intent to Dismiss*.

e. The Court states, "Further, the conduct of appellate counsel on post-conviction appeals is not grounds for relief." *Memorandum Decision* at 14. The Court also sets forth an apparent argument that Petitioner could not prove prejudice in his claims against his appellate counsel in stating, "Further, even if appellate counsel had properly raised on appeal the extension of *Pizutto*, for purposes of the petition for review, it is pure speculation that the Idaho Supreme Court would have extended the reasoning in *Pizutto* to noncapital cases." *Id.* Petitioner seeks the opportunity to research and respond to these legal analysis and conclusions, which were not contained in the Court's *Notice of Intent to Dismiss*.

f. The Court finally concludes that the doctrines of "law of the case" and res judicata bar Petitioner's claim. Given the full legal analysis of the *Memorandum Decision*, Petitioner seeks the opportunity to respond to the Court's conclusion. Petitioner acknowledges that the Court gave notice of the intent to dismiss based upon these two legal decisions in the Court's *Notice of Intent to Dismiss*; however, Petitioner asserts that the legal basis and reasoning for concluding the same as set forth in the *Memorandum Decision* is now substantially different. Therefore, Petitioner seeks the opportunity to research and respond to the Court's conclusion.

Petitioner has not had the opportunity to respond or in any way answer any of the foregoing factual assertions, analysis or legal conclusions of the Court. Pursuant to Idaho Code § 19-4906(b), Petitioner simply asks that he be given twenty (20) days to have the ability to research and answer the same and thereby have "a chance to argue the point(s) which determine

the outcome of [Petitioner's] case" and "have the opportunity to challenge an adverse decision before it becomes final". *Gibbs*. at 760, 653 P.2d at 815 (Ct. App. 1982).

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court, pursuant to Idaho Code § 19-4906 grants Petitioner a period of twenty (20) days to respond to the Court's new factual assertions, analysis and legal conclusions as contained in the *Memorandum Decision re: Notice of Intent to Dismiss*. Oral Argument is requested on this matter.

DATED this 14th day of August, 2013.

McRAE LAW OFFICE, PLLC

By: 

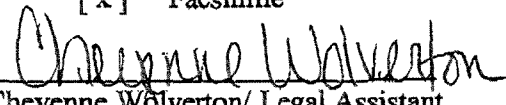
Steven R. McRae
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of August, 2013, I served a true and correct copy of the within and foregoing document upon the following:

Gooding County Prosecutor
P.O. Box 86
Gooding, ID 83330
Fax: (208) 934-4494

<input type="checkbox"/>	U.S. Mail, postage prepaid
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Overnight Mail
<input checked="" type="checkbox"/>	Facsimile


Cheyenne Wolverton/ Legal Assistant

DISTRICT COURT
GOODING CO. IDAHO
FILED

2013 AUG 27 PM 12:30

GOODING COUNTY CLERK

BY:  DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

ROBERT JOHNSON,)	
)	
Petitioner,)	
)	
vs.	)	Case No. CV-2013-84
)	
STATE OF IDAHO ,)	
)	
Respondent.)	
)	

ORDER DENYING MOTION FOR RECONSIDERATION

On July 31, 2013 the Court entered its Memorandum Decision Re: Notice of Intent to Dismiss and Judgment of Dismissal as to the petitioner's Second Successive Petition for Post-Conviction Relief.

On August 14, 2013 counsel for the petitioner filed his Motion for Reconsideration. The petitioner seeks reconsideration based on *Gibbs v. State*, 103 Idaho 758, 653 P.2d 813 (Ct. App. 1982). The court gave notice to the petitioner in the Court's Notice of Intent to Dismiss that the issue of timeliness of the claims asserted in his first successive petition were finally determined by the Idaho Court of Appeals and that it was the burden of the petitioner to provide a "sufficient reason" to support a second successive petition for post-conviction relief. The petitioner was put on notice that it was his burden to present those facts that he allegedly provided to his previously

appointed post-conviction that would have established the timeliness of his first successive petition.

The court provided sufficient notice to the petitioner that he had the burden to establish a sufficient reason to support his second successive petition for post-conviction relief. There can be no dispute that the court's grounds upon which summary disposition is based must be stated. I.R.C.P. 7(b)(1); *DeRushe v. State*, 146 Idaho 599, 601, 200 P.3d 1148, 1150 (2009); I.C. § 19-4906(b). In *DeRushe*, the Court retreated from a series of cases that required a high level of detail and specificity regarding the asserted deficiencies in the petitioner's claims in order to be considered adequate notice. The Court stated that "The particularity requirement of Rule 7(b)(1) does not mandate that level of detail. The Rule only requires reasonable particularity. If the notice is sufficient that the other party cannot assert surprise or prejudice, the requirement is met." *DeRushe v. State*, 146 Idaho 599, 601, 200 P.3d 1148, 1150 (2009) (internal citations omitted). In *Kelly v. State*, 149 Idaho 517, 236 P.3d 1277 (2010), the Court held that the State's motion for summary disposition stating simply that Kelly "has no evidentiary basis to support his claims, *Small v. State*, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998)" was adequate notice to place the question of the sufficiency of Kelly's evidentiary support for all of his claims at issue. *Kelly v. State*, 149 Idaho 517, 522, 236 P.3d 1277, 1282 (2010).

The petitioner alleged that the determination that his first successive petition was untimely was for the reason that his prior post-conviction counsel had failed to provide to the court "facts" on the issue of timeliness of his successive petition. Petitioner claimed to have disclosed such "facts" to his prior post-conviction counsel and that such counsel failed to use such facts to support the timeliness of his successive petition. The petitioner presented to the court the alleged facts, and this court concluded that such "facts" were nothing more than bare

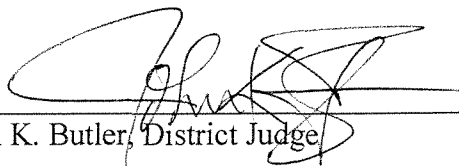
conclusions or general allegations. In the absence of a "sufficient reason" for the second successive petition for post-conviction relief, the petition is barred by reason of res judicata and/or the doctrine of the law of the case. The legal conclusions of the court are not the relevant consideration of the sufficiency of the notice for purposes of summary dismissal. The petitioner had sufficient notice of the grounds upon which his second successive petition was dismissed.

CONCLUSION AND ORDER

For the reasons set forth above, the Petitioner's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

DATED this 27 day of August, 2013



John K. Butler, District Judge

CERTIFICATE OF MAILING/DELIVERY

I, undersigned, hereby certify that on the 27 day of August, 2013 a true and correct copy of the foregoing ORDER DENYING MOTION FOR RECONSIDERATION was mailed, postage paid, and/or hand-delivered to the following persons:

Robert Terry Johnson
IDOC # 27073
ICC- I 219 B
P.O. Box 70010
Boise, Idaho 83707

Gooding County Prosecutor
P.O. Box 86
Gooding, Idaho 83330

Steven R. McRae
McRae Law Office, PLLC
161 5th Ave. South, Ste. 100
P.O. Box 1233
Twin Falls, Idaho 83303



Deputy Clerk

DISTRICT COURT
GOODING CO. IDAHO
FILED

Steven R. McRae [ISB No. 7984]
McRAE LAW OFFICE, PLLC
P.O. Box 1233
Twin Falls, ID 83303-1233
Telephone No. (208) 944-0755
Facsimile No. (208) 736-0041
e-mail: SMcRae@MagicValleyLegal.com

2013 SEP -9 AM 9:56

GOODING COUNTY CLERK
JULIE GOLD
BY: _____
DEPUTY

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF GOODING

ROBERT JOHNSON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. CV-2013-84

NOTICE OF APPEAL

TO: THE ABOVE-NAMED RESPONDENT, STATE OF IDAHO, AND ITS
ATTORNEY OF RECORD, JOHN HORGAN, AND THE CLERK OF THE
ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant, Robert Johnson, appeals against the above-named respondent to the Idaho Supreme Court from the Memorandum Decision Re: Notice of Intent to Dismiss entered July 31, 2013, the Order Denying Motion for Reconsideration entered on August 27, 2013, and the Judgment of Dismissal entered on July 31, 2013, Honorable John K. Butler presiding.

2. The party has a right to appeal to the Idaho Supreme Court, and the Orders described in Paragraph 1 above are appealable Orders under and pursuant to I.A.R. 11 (a)(1) and (7).

3. Preliminary Statement of the Issue on Appeal. That the issues on appeal will include all issues as contained and addressed in the Memorandum Decision Re: Notice of Intent to Dismiss, the Order Denying Motion for Reconsideration, and other issues to be determined at a later date.

4. The Appellant requests the following documents to be included in the Clerk's record, in addition to those automatically included under I.A.R. 28:

- a. Petition and Affidavit for 2nd Successive Post Conviction Relief filed on February 14, 2013;
- b. Notice of Intent to Dismiss filed on March 12, 2013;
- c. Petitioner's Reply to Notice of Intent to Dismiss filed July 3, 2013;
- d. Partial Supplemental Affidavit of Robert Johnson filed July 3, 2013;
- e. Affidavit of Robert Richard Jones filed July 3, 2013;
- f. Affidavit of Erik R. Lehtinen filed July 3, 2013;
- g. Memorandum Decision Re: Notice of Intent to Dismiss entered July 31, 2013;
- h. Judgment of Dismissal filed July 31, 2013;
- i. Motion for Reconsideration and Request for Opportunity to Respond I.R.C.P. 11(a)(2), I.C. § 19-4906(b) filed August 14, 2013;
- j. Order Denying Motion for Reconsideration entered on August 27, 2013; and
- k. The Register of Actions in this matter.

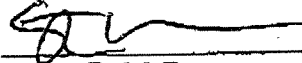
5. I certify:

(a) That the Appellant is exempt from paying the estimated fee for the preparation of the Clerk's record because he is incarcerated and is indigent;

(b) That the Appellant is exempt from paying the appellate filing fee because he is incarcerated and is indigent;

(c) That service has been made upon all parties required to be served pursuant to Rule 20 I.A.R. and the Attorney General of Idaho.

DATED THIS 9th day of September, 2013.


Steven R. McRae
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September, 2013, I served a true and correct copy of the within and foregoing document upon the attorney(s) or person(s) named below in the manner noted:

Gooding County Prosecutor
P.O. Box 86
Gooding, ID 83330
Fax: (208) 934-4494

☒ U.S. Mail

Clerk of the Idaho Supreme Court
P.O. Box 83720
Boise, Idaho 83720

☒ U.S. Mail

Attorney General's Office
P.O. Box 83720, Room 210
Boise, Idaho 83720

☒ U.S. Mail

Office of the State Appellate
Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83706

☒ U.S. Mail

Gooding County Courthouse
P.O. Box 417
Gooding, ID 83330
Fax: (208) 934-4408

☒ Facsimile

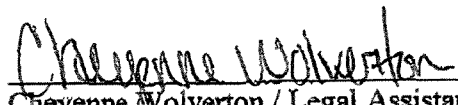

Cheyenne Wolverton / Legal Assistant

EXHIBIT LIST

Johnson v State
Gooding County Case #CV 2013-000084
Supreme Court Case #41414-2013

(No Exhibits offered or admitted)

EXHIBIT LIST

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

ROBERT JOHNSON,)
Petitioner/Appellant,)
vs.)
STATE OF IDAHO,)
Respondent.)
_____)

Supreme Court No. 41414

CLERK'S CERTIFICATE

I, Cynthia R. Eagle-Ervin, Deputy Clerk of the District Court of the Fifth Judicial District, of the State of Idaho, in and for the County of Gooding, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I, do further certify that there were no exhibits offered or admitted and no hearings held in this matter so there are no Court Reporter's Transcripts to be lodged with the Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 28 day of October, 2013.

Clerk of the District Court

By: _____

Cynthia R. Eagle-Ervin
Deputy Clerk

CLERK'S CERTIFICATE

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

ROBERT JOHNSON,)	
Petitioner/Appellant,)	
	)	Supreme Court No. 41414-2013
vs.)	
	)	CERRIFIACTE OF SERVICEL
STATE OF IDAHO,)	
Respondent.)	
_____)	

I, Cynthia Eagle-Ervin, Deputy Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Gooding, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record and any exhibits offered or admitted to each of the Attorneys of Record in this case as follows:

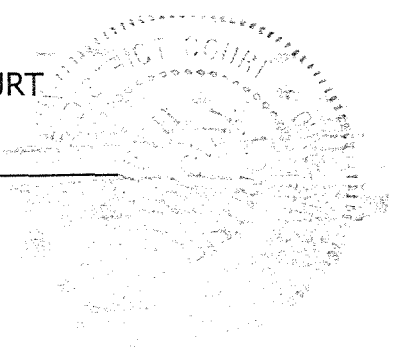
Sara Thomas
State Appellate Public Defender
P.O. Box 83720
BOISE, ID 83720

Lawrence Wasden
ATTORNEY GENERAL
STATEHOUSE MAIL, RM 210
BOISE, IDAHO 83720

IN WITNESS WHEREOF, I have hereunto **set my hand and affixed the seal** of said Court this 1st day of November, 2013.

CLERK OF THE DISTRICT COURT

By: _____



CERTIFICATE OF SERVICE